Michigan Law Review

Volume 63 | Issue 1

1964

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Recommended Citation

Roger C. Cramton, *The Powers of the Michigan Civil Rights Commission*, 63 MICH. L. REV. 5 (1964).

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THE POWERS OF THE MICHIGAN CIVIL RIGHTS COMMISSION

*Roger C. Cramton**

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean, neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, THROUGH THE LOOKING GLASS

IN a statewide referendum on April 1, 1963, Michigan voters approved by a narrow margin the revised constitution which had emerged from a constitutional convention held in 1961-1962. Wittingly or unwittingly, the electorate created a fourth branch of government—the Michigan Civil Rights Commission. On January 1, 1964, when the constitution became effective, this new organ of government automatically came into existence, created by a self-executing provision of the new constitution. The eight members of the Commission, who had previously been appointed by Governor Romney and confirmed by the Senate,¹ assumed the powers and responsibilities vested in the Commission by article V, section 29 of the revised constitution.

Even before the Civil Rights Commission sprang into being, Attorney General Frank J. Kelley had issued three legal opinions setting forth his views on the powers and responsibilities of the Commission.² The revised constitution, the Attorney General opined, created broad new civil rights protecting individuals from private discrimination on racial, religious, and ethnic grounds in the fields of employment, education, housing, and public accommodations.³ The authority to protect and enforce these rights, he contended, was vested in the Civil Rights Commission. Quotations from the Attorney General's first opinion indicate the sweep of his language: "[T]he new Civil Rights Commission . . . has plenary power within the sphere of its authority, to protect civil rights in the fields of employment, education, housing and public accommodations";⁴ ". . . included within such grant [of plenary power] is the

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1. MICH. S. J., 72d Legis. (Reg. Sess.), No. 38, at 464 (1964).

2. OPS. MICH. ATT'Y GEN. No. 4161 (July 22, 1963); *id.*, No. 4195 (Oct. 3, 1963); *id.*, No. 4211 (Nov. 18, 1963).

3. OPS. MICH. ATT'Y GEN. No. 4161 (July 22, 1963) *passim*.

4. *Id.* at 17.

enforcement of civil rights to purchase, mortgage, lease or rent private housing";⁵ "I find no authority in the Constitution under which the legislature could abrogate or limit in any way the power of the Civil Rights Commission in the fields of employment, education, housing and public accommodations."⁶

The implications of the Attorney General's generous interpretation of the Commission's responsibilities are startling. It is surprising to learn that Michigan, without fanfare—indeed, without being aware that such a dramatic change was proposed—has embodied enforceable restrictions on private acts of discrimination in its fundamental law. And it is alarming to learn that neither the legislature nor anyone else, except perhaps reviewing courts, can make any contribution to the solution of the perplexing problems of race relations in Michigan. If the Attorney General is to be believed, the enforcement of civil rights pertaining to racial, religious, and ethnic discrimination is now vested, free from legislative control, in a constitutionally-created administrative agency; and the future role of the legislature in this vital area of contemporary life is limited to paying the Commission's bills. The formulation and implementation of social policy on one of the most important issues of modern society has been placed, beyond the control of the electorate, in the exclusive safe-keeping of the Civil Rights Commission.

The thesis of this article is that the Attorney General has misread the language and actions of the constitution-makers. The Michigan Civil Rights Commission is an important and powerful agency of government which has substantial tasks to perform. But it does not possess the exclusive powers envisioned by the Attorney General. Other governmental units—the legislature, the executive, the courts, and the local governments—may continue to play a creative and positive role in fashioning a legal order that accords to every human being in society a reasonable opportunity to realize his potentialities.

I. THE CIVIL RIGHTS PROVISIONS OF THE REVISED CONSTITUTION

Michigan's revised constitution contains two principal provisions designed to protect civil rights against discrimination based on race, religion, color, or national origin. A general statement guaranteeing equal protection and enjoyment of civil rights without racial and ethnic discrimination is embodied in section 2 of article I, an article

5. *Ibid.*

6. *Ibid.*

entitled "Declaration of Rights." In addition, section 29 of article V, the article dealing with the executive branch, establishes a Civil Rights Commission and outlines its powers and duties. The full text of these constitutional provisions reads as follows:

Article I, section 2⁷

"No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

Article V, section 29⁸

"There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the Senate, for four-year terms not more than two of which shall expire in the same year. It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. The legislature shall provide an annual appropriation for the effective operation of the commission.

"The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. The commission shall have other powers provided by law to carry out its purposes. Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

"Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law."

II. A SHORT HISTORY OF THE CIVIL RIGHTS PROVISIONS

The constitutional convention of 1961-1962 was the outgrowth

7. Hereinafter referred to as "the anti-discrimination declaration."

8. Hereinafter referred to as "the civil rights commission provision."

of a long struggle for constitutional revision in Michigan. Passage of the so-called Gateway Amendment paved the way for submission of the question of general constitutional revision to the voters by referendum in April 1961.⁹ The proposal calling for a constitutional convention was approved by a narrow margin at the polls, and, after much preparatory work, delegates were nominated in a primary election held on July 25, 1961, and elected on September 12, 1961.¹⁰

The Republican candidates fared very well in the election of "Con-Con" delegates: of the 144 delegates (one for each senate and house district), 99 were Republicans and 45 were Democrats.¹¹ This two-to-one preponderance gave the Republicans complete control of the organization of the convention and its committee structure. Except on a few major issues, however, divisions in the convention did not follow party lines too closely; on many issues, such as civil rights, there was a broad area of agreement between the dominant Republican group of moderates and a substantial number of Democrats.¹²

The degree of partisanship increased, however, as the convention proceeded, particularly after George Romney, who had become associated in the public mind with the emerging document, announced his gubernatorial ambitions. At the end, on August 1, 1962, only five Democratic delegates joined 93 Republican delegates in voting for adoption of the final document.¹³ During the political campaign that followed, Democratic delegates, who had hailed the initial proposal of a constitutional provision establishing a civil rights commission as "protect[ing] a large segment of the population against a common abuse,"¹⁴ a "light of progress,"¹⁵ and "a step forward,"¹⁶ argued against the adoption of the revised constitution by the people, in part on the ground that the proposed Civil Rights Commission would be weak, ineffective, and meaningless.¹⁷

9. See the excellent treatment of developments leading to the constitutional convention in STURM, *CONSTITUTION-MAKING IN MICHIGAN 1961-1962*, at 20-54 (Michigan Governmental Studies No. 43, 1963).

10. *Id.* at 41-47.

11. MICHIGAN CONSTITUTIONAL CONVENTION, *WHAT THE PROPOSED NEW STATE CONSTITUTION MEANS TO YOU* 2 (1962), reprinted in 2 OFFICIAL RECORD OF THE 1961 MICHIGAN CONSTITUTIONAL CONVENTION 3358 (1963) [hereinafter cited as RECORD].

12. See STURM, *op. cit. supra* note 9, at 38-54, 102-27.

13. 2 RECORD 3255-81, 3300-01; STURM, *op. cit. supra* note 9, at 250-53.

14. 2 RECORD 2763 (Mrs. Daisy Elliott).

15. *Id.* at 2763 (Delegate Bledsoe).

16. *Id.* at 2762 (Mr. Norris).

17. *E.g.*, Detroit Free Press, Feb. 24, 1963, p. 3-B, col. 4 (Mr. Norris); Lawyers To Reject the Con-Con Proposition, Why You Should Reject the Con-Con Proposition, p. 2, col. 2 (pamphlet circulated prior to the April 1963 election).

A. *The Adoption of the Anti-Discrimination Provision—
Article I, Section 2*

The anti-discrimination declaration of article I, section 2 of the revised constitution was proposed and adopted by the convention several months prior to serious consideration of the Civil Rights Commission proposal. The Committee on Declaration of Rights, Suffrage and Elections, composed of fifteen delegates and headed by a distinguished political scientist, Professor James K. Pollock of the University of Michigan, gave extensive consideration to various delegate proposals dealing with racial discrimination¹⁸ and to the anti-discrimination provisions of other state constitutions.¹⁹ The committee decided unanimously that a general declaration against racial and ethnic discrimination, with implementation left to the legislature, should be included in the constitution. Committee Proposal 26, embodying the committee's views, was submitted to the convention on February 1, 1962; it was approved without amendment after extensive discussion.²⁰

The committee report accompanying Committee Proposal 26 referred to the "impressive and moving testimony" of Delegate John Hannah, a member of the committee who was also chairman of the United States Commission on Civil Rights, and of other individuals who appeared before the committee.²¹ The committee felt that an anti-discrimination declaration was necessary "to protect negroes and other minorities against discrimination in housing, employment, education and the like."²² "Civil rights" were not defined in detail; rather, the legislature was to define their scope, limits, and sanctions. The report, however, did indicate areas of principal concern: "As Mr. Hannah stated in his paper to the committee, 'Civil rights as used herein means guarantees to protect against discrimination and segregation because of race, color, religion, ancestry or national origin. . . .' The principal but not exclusive, areas of concern are equal opportunities in employment, education, housing, and public accommodations."²³

Professor Pollock, in his remarks introducing the committee pro-

18. Delegate proposals 1014 (Mr. Norris), 1174 (Mr. Norris), 1216 (Mr. Norris), 1455 (Mr. J. A. Hannah), 1921 (Mr. Downs *et al.*)

19. See 1 RECORD 739-40.

20. The discussion of the anti-discrimination declaration may be found in 1 RECORD 739-52. Committee Proposal 26 received unanimous approval on Feb. 2, 1962. 1 RECORD 760.

21. *Id.* at 740.

22. *Ibid.*

23. *Ibid.*

posal to the convention, aptly summarized its effect: "We felt that, in the event we wanted to have a specific non-discrimination clause, it would be better to state as a general policy of the constitution that there shall be no discrimination based on race, religion or national origin in the enjoyment of political or civil rights, and that the legislature should have the power to enforce this by appropriate legislation."²⁴ Comments by other delegates indicate that this was their general understanding of the anti-discrimination declaration.²⁵

The limited nature of the anti-discrimination declaration was highlighted by the attempts of the Democratic minority to substitute a more far-reaching proposal.²⁶ The minority proposal contained a specific reference to the fields of "employment, housing, public accommodations and education" as areas in which "no person shall, because of his race, color, religion, national origin or ancestry, be discriminated against. . . ."²⁷ Moreover, express language made the prohibition applicable to private conduct. After full discussion, in which the differences between the two proposals were clearly indicated, the convention rejected the minority proposal and unanimously adopted the majority proposal.²⁸

Rejection of the minority proposal carried with it the implication that the anti-discrimination provision adopted by the convention would have no effect on then lawful acts of private discrimination. If any doubt remained on this subject, Professor Pollock's explicit remarks should have dispelled them. He stated bluntly: ". . . this is not a directly enforceable provision in regard to private persons. . . ."²⁹ Legislation would be required, he added, to create and define new civil rights and to provide sanctions for their violation.³⁰

B. *Evolution of the Civil Rights Commission Proposal—
Article V, Section 29*

The proposal for a constitutional provision establishing a civil rights commission suddenly emerged from the Committee on the Executive Branch as the constitutional convention went into its

24. *Id.* at 741-42.

25. See *id.* at 740-49 *passim*.

26. *Id.* at 740-41.

27. *Ibid.* The text of the minority anti-discrimination provision is reproduced in 1 RECORD 742.

28. The minority proposal was rejected, eighty to fifty. *Id.* at 750. The majority proposal was adopted by a unanimous voice vote. *Id.* at 760.

29. *Id.* at 742.

30. *Ibid.*

final—and highly political—stage.³¹ The committee's conclusion—to establish machinery for the implementation of civil rights—was not embodied in a committee proposal and supporting report; rather, it was presented to the committee of the whole as an amendment to a pending, and unrelated, proposal dealing with the executive branch. Unlike the other provisions of the revised constitution, the civil rights commission proposal was the product, almost exclusively, of discussion and debate on the floor of the convention. Thus the debates are unusually important to an understanding of the provision now embodied in article V, section 29.

The language and features of the civil rights commission provision were worked out on the convention floor during four arduous days of debate.³² The initial issue, of course, was whether the constitution should include a provision relating to a civil rights commission. A small group of delegates argued that implementation of civil rights should be left entirely to the discretion of the legislature and the courts.³³ A substantial majority, however, became persuaded that a constitutional civil rights commission provision was desirable. An administrative agency, unlike the courts, could use techniques of education, conciliation, and persuasion, as well as those of litigation.³⁴ Public enforcement machinery, it was thought, might be more effective than private litigation, since individuals discriminated against often do not have sufficient resources to vindicate their own rights in the courts.³⁵ These and other considerations—including perhaps a political motivation to make the emerging constitution more attractive to minority groups—led a substantial majority of the delegates to the conclusion that the constitution should include some sort of provision relating to a civil rights commission.³⁶

A second major issue, discussion of which was interspersed with that of the first, was whether the constitutional language should create a civil rights commission of its own force, or should impose upon the legislature a duty to create such a commission within a specified period of time. The original proposal of the Committee on the Executive Branch took the latter course, requiring the legis-

31. 2 RECORD 1921 (March 28, 1962). The political aspects of the convention are ably discussed in STURM, *op. cit. supra* note 9, at 103-27, 161-66, 198-99.

32. March 28 and 29, and April 5 and 6, 1962. Major discussion of the Civil Rights Commission provision may be found in 2 RECORD 1921-51, 1976-2006, 2075-76, 2182-2200, 2755-64, 3118.

33. See, e.g., *id.* at 1924-25 (Messrs. Yeager and Stevens).

34. See, e.g., *id.* at 1927-31.

35. E.g., *id.* at 1928 (Mr. Downs).

36. Although no formal vote was taken at the time, it appears that a consensus in favor of a constitutional provision relating to a civil rights commission had developed by the end of the first day's debate. See *id.* at 1950 (Mr. Norris).

lature to create a civil rights commission within two years after the adoption of the constitution; if the legislature failed to act, the governor was required and empowered to create the commission by executive order.³⁷ This proposal was attacked by delegates of both parties: Democratic delegates argued that the legislature would fail to act or would create only a token agency;³⁸ Republicans were fearful that the governor might veto the legislature's action and take the matter into his own hands.³⁹ Although other delegates asserted that bad faith on the part of the legislature and governor could not be assumed, sentiment gradually veered toward a self-executing provision.

Once the convention had decided in favor of a self-executing provision for the creation of a civil rights commission, the powers to be exercised by that body—and the limitations on those powers—became a more crucial matter. Despite a general disinclination to get involved in “legislative detail,” the convention gradually moved to a more detailed statement of the Commission's composition and powers. How should the Commission be constituted? What functions was it to perform? What minimum powers, free from legislative attack, was it to possess? What procedural safeguards should apply to the Commission's proceedings? What should be the scope of judicial review of the Commission's orders? What effect should the provision have on judicial remedies in the civil rights field? These and other issues were the subject of extended debate and the language adopted was an attempt to resolve them. In the resolution of these issues, two considerations were foremost: first, a desire to protect the Commission against legislative attack or executive domination by clothing it with a *minimum* set of powers; second, a need to provide for flexibility and change by preserving the legislature's extensive powers with respect to civil rights. The language of article V, section 29 reflects a balancing of these twin objectives; neither was sacrificed to the other.

III. FUNCTIONS AND POWERS OF THE CIVIL RIGHTS COMMISSION

The starting point with any problem of constitutional interpretation must be the language of the instrument itself. Constitutions are not struck off at a moment's notice; they are carefully drafted docu-

37. The Committee proposal was submitted as an amendment adding a new section (i) to a pending proposal, Committee Proposal 71. The text appears at 2 RECORD 1921-22.

38. See, e.g., *id.* at 1935 (Mr. Young); *id.* at 1939-40 (Mr. Nord).

39. See, e.g., *id.* at 1925-26 (Mr. Higgs); *id.* at 1940 (Mr. Sterrett); *id.* at 1940-41 (Mr. Everett).

ments, reflecting painstaking labor and extensive thought. The language in individual provisions—and the interrelationship of separate provisions—is carefully selected to minimize problems of construction and interpretation. Therefore, constitutional language should be given an ordinary and natural meaning when viewed in its total context. Strained constructions or novel interpretations should be avoided unless there is no other way to make sense out of the document or to rationalize its parts.

Provisions of the revised constitution that relate to civil rights should be approached in this manner. Although attention will be given to other evidence bearing on meaning—the convention deliberations and campaign pronouncements—the main focus in this section will be on the language used by the framers.

A. The Legislature's Authority To Define and Implement the State's Anti-Discrimination Policy

The anti-discrimination declaration of article I, section 2 of the revised constitution states the general policy of the State of Michigan. It begins with an equal protection clause framed in traditional language: "No person shall be denied the equal protection of the laws." More unusual in state constitutions is the language that immediately follows: "nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." The final sentence qualifies the entire provision: "The legislature shall implement this section by appropriate legislation."⁴⁰

The language of article I, section 2, examined in the light of its history, compels two conclusions. First, denial of equal protection of civil rights is prohibited in language of general principle rather than specific commands addressed to private persons. The anti-discrimination provision adopts and builds upon existing law; it does not purport to create or define new civil rights in areas of private discrimination. Second, the legislature is empowered to create and define the "civil rights" that it feels are deserving of protection. The nature and scope of these rights, and the remedies available for their violation, are left to legislative judgment. The role of the legislature in the civil rights field is to be its normal role as the main engine of law creation of the society.

B. Establishment and Composition of the Civil Rights Commission

The Commission was created by direct constitutional provision: "There is hereby established a civil rights commission . . ." Thus

40. MICH. CONST. art. I, § 2.

the Commission, clothed with the minimum powers provided in the document, automatically came into existence when the constitution became effective on January 1, 1964. For the Commission to commence operations, only two prerequisites were necessary: (1) appointment of its membership by the governor, with the consent of the senate; and (2) appropriation of funds sufficient for the Commission to undertake its responsibilities. Both prerequisites were fulfilled by early 1964,⁴¹ and the Commission began its work by inheriting the caseload of the Fair Employment Practices Commission.

The relatively large size of the commission, eight members appointed for staggered four-year terms, is explained by the convention's hope that the Commission would be representative of the larger community. The draftsmen of the proposal believed that a smaller commission could not contain members of minority groups and still be representative of the total community. As delegate John Hannah put it, "[I]f their work and recommendations and action are to be accepted by most people, it is important that a majority of the members be not members of minority races or groups that are discriminated against."⁴² Proposals advanced by Democratic delegates for an odd-numbered commission of five members were rejected in favor of a larger, bipartisan commission of eight members, no more than four of whom may be of the same political party.⁴³ Democratic fears that the senate might frustrate the operation of the Commission by refusing to confirm gubernatorial appointees were answered by the constitutional definition of advice and consent contained in section 6 of article V, which provides that appointments are to be effective if the senate does not disapprove them within sixty session days after the date of the appointment.⁴⁴

Beyond these matters, the constitution does not dictate the organization of the Commission. The 1963 statute⁴⁵ implementing the civil rights commission provision, however, adds a few details: members of the Commission are to receive compensation of twenty-five dollars per day for their efforts, plus reimbursement for actual expenses;⁴⁶ a quorum consists of a majority of the members, but a

41. See MICH. H. R. J., 71st Legis. (2d Ex. Sess.), No. 13, at 300 (1963), and MICH. S. J., 72d Legis. (Reg. Sess.), No. 38, at 464 (1964).

42. 2 RECORD 2183.

43. *Id.* at 1990-91.

44. *Id.* at 1996-99; MICH. CONST. art. 5, § 6.

45. MICH. COMP. LAWS §§ 37.1-9 (1964).

46. MICH. COMP. LAWS § 37.2 (1964). Compensation is limited to a total of 80 days per year, placing a ceiling of two thousand dollars on the annual compensation of commission members.

majority of a quorum may deal with "ministerial matters";⁴⁷ and the Commission is authorized to appoint a staff director⁴⁸ and such other employees as it deems advisable, subject to civil service regulations.⁴⁹

C. *Substantive Responsibilities of the Commission*

Although the revised constitution devotes three paragraphs to the Civil Rights Commission, only one sentence deals with the substantive responsibilities of the Commission:

"It shall be the duty of the Commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination."⁵⁰

Analysis of this long and awkward sentence reveals that the Commission has two functions: (1) "to investigate" alleged racial and ethnic discrimination, and (2) "to secure the equal protection of [the civil rights guaranteed by law and by this constitution] without [discrimination against any person because of religion, race, color or national origin]." Both the investigating function and the implementing function are confined to one area: "alleged discrimination in the enjoyment of the civil rights guaranteed by law and by this constitution." And both functions are to be exercised "in a manner which may be prescribed by law."

1. *Authority of the legislature to prescribe the manner in which the Commission's responsibilities are performed.* A careful reading of the second sentence of article V, section 29 reveals that the clause "in a manner which may be prescribed by law" modifies the duty of the Commission "to secure" as well as "to investigate." The position of the clause, the parallelism of the sentence, and ordinary usage compel this conclusion. Indeed, it would be unnecessary to belabor the point were it not that the Attorney General, in his first opinion interpreting this language, suggested that the legislature's power to control the conduct of the Civil Rights Commission extends only to the Commission's investigatory function.⁵¹ Although the opin-

47. MICH. COMP. LAWS § 37.3 (1964).

48. The staff director "shall carry on the administrative and ministerial functions of the commission when it is not in session and . . . shall act in such other capacities as the commission may direct." MICH. COMP. LAWS § 37.5 (1964).

49. MICH. COMP. LAWS § 37.5 (1964).

50. MICH. CONST. art. 5, § 29.

51. This is an inference drawn from repeated statements that the legislature cannot limit the powers of the commission, although it may "prescribe the mode or manner

ion is not explicit on the matter, the Attorney General appears to read the sentence under consideration as if it read: "It shall be the duty of the commission to investigate in a manner prescribed by law . . . and to secure" This is not, however, the way the constitution reads. The clause empowering the legislature to control the manner in which the Commission performs its functions precedes rather than follows the parallel statement of functions: "to investigate" and "to secure." If the draftsmen had desired to modify only one or the other of the functions, it would have been a simple matter to place the clause within one of the parallel provisions. By placing it after "duty" and in front of the parallel provisions, the draftsmen clearly stated that the legislature might prescribe the manner in which the Commission performs either of its responsibilities.

The outer limits of the legislature's power under this clause are clear, but there is a shadowy middle area that must await judicial construction. Surely the legislature cannot strip the Commission of the minimum powers given to it in the second paragraph of article V, section 29, for these powers rest on a constitutional base beyond the legislature's reach. On the other hand, the legislature can create new civil rights, define the remedies available for their violation, and dictate the procedural steps by which they may be enforced. At some point, the legislative prescription of procedural details may begin to impair the exercise of the Commission's constitutional powers; a question of constitutional interpretation would then be presented.

2. *Limitation of the Commission's authority to discriminatory acts which interfere with "the enjoyment of the civil rights guaranteed by law and by this constitution."* The Civil Rights Commission was not given a roving mission to solve all of the ills of modern society. Its jurisdiction was limited to racial, religious, and ethnic discrimination that interferes with the enjoyment of, or denies equal protection to, "the civil rights guaranteed by law and by this constitution." The crucial questions, of course, are: What civil rights are to be free from invidious discrimination? Who is to define them? These questions will receive detailed consideration at a later point.⁵² For the moment, I desire only to emphasize what the constitutional language does *not* say.

The constitution does not state that the Commission should act to correct whatever racial and ethnic discrimination it thinks

in which investigations are to be conducted." OPS. MICH. ATT'Y GEN. No. 4146, at 18 (July 22, 1963).

52. See part IV *infra*, especially the text at notes 181-93.

should be eliminated. The Commission is to protect only those civil rights "guaranteed by law and by this constitution." Since article V, section 29 is an implementing provision and does not purport to create new rights, other provisions of the constitution must give rise to whatever constitutional rights and duties are enforceable under this provision of the revised constitution. Similarly, rights "guaranteed by law" must find their origin in legislative enactment or judicial decision. The Civil Rights Commission cannot "investigate" or "secure" rights that do not exist.

3. *The investigatory function.* "[T]he life blood of the administrative process," it has been said, "is the flow of fact, the gathering, the organization, and the analysis of evidence."⁵³ The informing and inquiring functions of government provide a reservoir of information from which legislative recommendations, decisional rules, and public enlightenment may flow. The investigatory function of the Civil Rights Commission, viewed in conjunction with the subpoena power contained in the second paragraph, encompasses the broad range of inquiring and informing activities: study, report, discussion, persuasion, publicity.

It is not clear whether the Commission's investigatory powers are broader than its enforcement functions. However, it would seem that the existence of private rights of nondiscrimination is a prerequisite to investigatory as well as to adjudicatory action by the Commission. The 1963 statute implementing article V, section 29 appears to take the same position since it authorizes compulsory process, through court authorization, "relating to matters under investigation or in question before the commission."⁵⁴

4. *The enforcement function.* The Commission's second responsibility is "to secure [in a manner prescribed by law] the equal protection of civil rights [guaranteed by law and by this constitution] without discrimination [against any person because of religion, race, color or national origin]." The verb "secure" has a number of meanings, depending on the context, but only a few are relevant here: "to relieve from exposure to danger; to put beyond hazard of losing or of not receiving; to bring about: effect, produce."⁵⁵ The common ground shared by these definitions indicates that the Com-

53. JAFFE & NATHANSON, *ADMINISTRATIVE LAW* 491 (2d ed. 1961). The investigative functions of the Civil Rights Commission should be compared to the legislative investigation, the grand jury inquiry, and the analogous informing and educating functions of executive officers and other administrative agencies.

54. MICH. COMP. LAWS § 37.5 (1964).

55. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2053 (1963).

mission is to bring about, or to prevent from loss, the rights of individuals to be free from invidious racial, religious, and ethnic discrimination. The nature and scope of these rights and duties must be found in some authoritative source. The Commission's function is to implement and to enforce rights elsewhere created—a very substantial job indeed but not an unlimited power to make law.

Usually the remedial sanctions (criminal penalties, fines, injunctive relief, money damages, etc.) available to an administrative agency will be specified in the enactment creating the rights and imposing the duties. In the absence of a remedial framework the Commission is powerless to do anything other than investigate, conciliate, and report.

The convention journal reveals that there was general agreement that the principal techniques of enforcement were to be informal rather than formal.⁵⁶ The choice of an administrative agency, rather than a court, was due to a belief that conciliation, education, and persuasion would be more effective than formal sanctions in the sensitive area of race relations.⁵⁷ As an influential group of delegates later stated in a public document: "Taking its cue from the experience of the Fair Employment Practices Commission the Convention believed that the greatest usefulness of the Civil Rights Commission will be in informal negotiation, conciliation and education, and that resort to the courts or even to formal commission hearings will be rare."⁵⁸

D. *Procedural Powers of the Commission*

Article V, section 29 is self-executing in two important respects: (1) the Civil Rights Commission was created by direct constitutional provision; and (2) the Commission was clothed with a minimum set of powers. Two sentences in the second paragraph of section 29 enumerate the Commission's minimum set of powers and the constitutional limitations on their use:

"The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its

56. See, e.g., 2 RECORD 1927-28 (Mr. Downs); *id.* at 1928-29 (Mr. Baginski); *id.* at 1929-31 (Messrs. Dade, Hannah, and Stevens). But a proposal designed to limit the Civil Rights Commission to informal functions of investigation and conciliation was defeated. *Id.* at 1945.

57. *Id.* at 1927-31, 1941-45.

58. Delegates Pollock, J. A. Hannah, Cudlip, Mosier, Lawrence, Cushman, Judd, Martin & McCauley, *Your Individual Rights in the New Constitution* 4-5 (undated brochure circulated prior to April 1963 election).

own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. The commission shall have other powers provided by law to carry out its purposes."⁵⁹

1. *Constitutional and statutory safeguards.*⁴ All powers of the Civil Rights Commission must be exercised "in accordance with the provisions of this constitution and of general laws governing administrative agencies." Three provisions of the revised constitution provide procedural safeguards against action of the Commission:

Article I, section 17, in addition to a traditional due process clause, provides: "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."⁶⁰ Since the Civil Rights Commission is part of the executive branch of government, this provision is applicable to it.

Article IV, section 37 permits the legislature to establish a joint committee to act between sessions and to suspend until the end of the next regular legislative session any rule or regulation of an administrative agency promulgated when the legislature is not in regular session.⁶¹ Attorney General Kelley has ruled that "this legislative power would not be applicable to a constitutional body such as the Civil Rights Commission, which is a constitutional authority serving in the executive branch of the government."⁶² With all deference, this view is patently erroneous. It is impossible to ignore the constitutional language that requires the Commission to act only "in accordance with the provisions of this constitution . . . governing administrative agencies." If the language were unclear, which it is not, the convention deliberations reveal that everyone understood that the constitutional and statutory provisions concerning legislative suspension and review of administrative rules were applicable to the Commission.⁶³ This understanding was also manifested in the political campaign that preceded adoption of the revised constitution.⁶⁴ For example, a pamphlet widely distributed

59. MICH. CONST. art. 5, § 29.

60. MICH. CONST. art. 1, § 17.

61. MICH. CONST. art. 4, § 37.

62. OPS. MICH. ATT'Y GEN. No. 4146, at 19 (July 22, 1963).

63. See, e.g., 2 RECORD 1927, 1989 (Mrs. Judd); *id.* at 1945 (Mr. Everett); *id.* at 1995 (Mr. Martin); *id.* at 2182 (Mr. Van Dusen); *id.* at 2186 (Mr. Austin); *id.* at 2192 (Mr. Ford). The only contrary statements were *in terrorem* arguments made in support of weakening amendments; e.g., *id.* at 1941 (Mr. Boothby).

64. E.g., Ann Arbor News, March 7, 1962, p. 6, col. 4 (one objection to Civil Rights Commission provision is that the Commission's rules would be subject to legislative suspension).

by the Citizens for Sound Government, an organization which opposed the constitution, argued that "work of agencies dealing with basic civil rights of the individual would be hamstrung by the Legislature. (The proposed Constitution empowers the Legislature to suspend rules which the agencies need to carry on their work of guaranteeing equality of treatment under the law.)"⁶⁵

Article VI, section 28 provides for extensive judicial review of decisions of "any administrative officer or agency existing under the constitution or by law."⁶⁶ Although this provision is largely displaced insofar as the Civil Rights Commission is concerned by the more specific judicial review provisions of the third paragraph of article V, section 29, it is otherwise applicable to the Commission.

The Commission must also exercise its powers "in accordance with the provisions . . . of general laws governing administrative agencies." Thus, existing and future statutes imposing general procedural requirements on administrative agencies are automatically applicable to the Civil Rights Commission. Delegate Van Dusen, in explaining the provisions of the substitute proposal that was adopted by the convention, stated that existing statutes which would "automatically apply" to the Commission "are the administrative code act and the administrative procedure act adopted by the legislature to guarantee due process in the conduct of the affairs of all administrative agencies of the state."⁶⁷ The Administrative Code Act⁶⁸ provides for publication and legislative review of rules promulgated by state agencies; the Michigan Administrative Procedure Act⁶⁹ imposes procedural requirements on the issuance of rules and the conduct of formal proceedings.

2. *Rulemaking powers of the Commission.* The Commission is given power, subject to the limitations noted above, "to promulgate rules and regulations for its own procedures" Limitation of this power to procedural rules and the absence of any grant of substantive rulemaking authority provide strong evidence that the Commission was not given legislative power to establish general standards to govern private conduct in the civil rights area. The convention journal eliminates any lingering doubts.

65. The Citizens for Sound Government, *Those Who Know Vote "No"* (unpaginated flyer, 1962). See also the flat assertion of Harold Norris in a newspaper article on the "weaknesses" of the Civil Rights Commission provision: "Power is granted to a legislative committee to suspend rules of administrative bodies. This will render ineffective such rules as 'Rule 9' and weaken the authority and initiative of the commission." *Detroit Free Press*, Feb. 24, 1963, p. 3-B, col. 4.

66. MICH. CONST. art. 6, § 28.

67. 2 RECORD 2182.

68. MICH. COMP. LAWS §§ 24.71-.82 (1964).

69. MICH. COMP. LAWS §§ 24.101-.110 (Supp. 1961).

The initial proposals that spelled out the constitutional powers of the proposed self-executing commission included a general grant of "power to promulgate rules and regulations."⁷⁰ When the Republican majority substituted the proposal that was ultimately adopted by the convention, the limiting words "for its own procedures" were added.⁷¹ Delegate Van Dusen took pains to point out that the substitute specified "that the rulemaking power of the commission is the power to promulgate rules and regulations for its own procedures"; he then called on delegate John Hannah to comment on "2 or 3 aspects of the proposed substitute which resulted from his experience as chairman of the federal civil rights commission, particularly the limitation of the rulemaking power to the rules and regulations for the procedures of the commission. . . ."⁷² Mr. Hannah replied:

"The next point that Mr. Van Dusen has raised is the one that gives the commission the power to make rules, and I was a little concerned by the wording. Certainly they must make rules for their own operations. . . . I am concerned because of some of the experiences that I have had in the . . . federal civil rights commission. The commissioners, I am sure, here, would be generally fair and objective in operating in the public interest; but there is a tendency, always, on the part of staff people, the full time employees, to sometimes forget the public interest and they are inclined to throw their weight around, sometimes to the embarrassment of the commissioners, and the commissioners find themselves, finally, the tools of their employees. I think that the change in language here is a distinct improvement."⁷³

Thus the purpose of the change was to limit the powers of the Commission. In the absence of legislation delegating substantive rulemaking authority to the Commission, it lacks power to issue binding rules and regulations governing private conduct.

3. *Adjudicatory powers of the Commission.* The constitution gives the Commission the minimum powers necessary to adjudicate formal proceedings: it may hold hearings, administer oaths, and take testimony; through court authorization it may require attendance of witnesses and submission of records; and it may issue "appropriate orders." These traditional powers of administrative tri-

70. The Austin substitute, offered by Messrs. Norris and Nord, was the first proposal to enumerate the minimum powers of the Commission. It contained the language quoted in the text. 2 RECORD 1982.

71. *Id.* at 2182.

72. *Id.* at 2183.

73. *Ibid.* It should be noted that a subsequent attempt proposed by Mr. Young to delete the words "for its own procedures," leaving the Commission with a general rule-making power, was defeated. *Id.* at 2197.

bunals may not be eliminated, although they may be channeled, by statute. There was little discussion of what constitutes an "appropriate order," but it appears that the cease and desist order was contemplated. Reference to cease and desist orders in the sentence governing judicial review of commission orders reinforces this view. There is no indication that the Commission was to have any authority to award money judgments or to exact penalties; moreover, these more unusual powers should not be presumed to be given in the absence of an express grant.

4. *Legislative authority to give additional powers to the Commission.* The second sentence of the second paragraph of article V, section 29 provides: "The commission shall have other powers provided by law to carry out its purposes." Throughout the convention's consideration of the civil rights commission proposal, it was recognized that the legislature would need to implement the provision by filling in details and adding such other powers as would be found necessary.⁷⁴ As delegate John Martin put it: "This is the barest kind of bones of authority to operate. It does not specify how, and it would undoubtedly fall to the legislature to implement this with legislation, filling in gaps as to what needed to be done."⁷⁵ Ultimately, in an attempt to leave no doubt that the legislature could and must implement the enforcement of civil rights by the Commission, three separate provisions were included in article V, section 29: (1) the legislature may prescribe the manner in which the Commission performs its constitutional duties (first paragraph, second sentence); (2) the Commission's powers must be exercised in accordance with constitutional provisions and general statutes governing administrative agencies (second paragraph, first sentence); and (3) the legislature is authorized to provide the Commission with additional powers consistent with its purposes (second paragraph, second sentence).

E. *Relationship of the Commission to the Courts*

1. *No displacement of judicial remedies.* The third sentence of the second paragraph of article V, section 29 provides: "Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state." This sentence, referred to as the "judi-

74. See, e.g., the discussion leading to inclusion of the language authorizing the legislature to prescribe the manner in which the Commission performs its functions. *Id.* at 1935-38, 1992-95.

75. *Id.* at 1990.

cial remedies provision," was the subject of much confusion and debate in the convention, but its purport is reasonably clear. The convention did not intend to confer exclusive jurisdiction in the civil rights field on the Commission. Remedies in the courts, including both those existing at the time and those subsequently created by legislative enactment or judicial decision, are not affected by the civil rights commission provision. Thus, an individual who has been subjected to illegal discriminatory treatment in a place of public accommodation may bring a damage action in the circuit court against the business engaged in such discrimination;⁷⁶ and the legislature may create new civil and criminal remedies for acts of private discrimination and may vest jurisdiction in the courts.

Fears were expressed in the convention that the judicial remedies provision would allow a respondent in a proceeding before the Civil Rights Commission to ignore the Commission by initiating a judicial proceeding. However, the principal spokesman for the civil rights commission provision stated that the judicial remedies clause would not have the effect of displacing the ordinary rule that administrative remedies must be exhausted prior to judicial review; an individual against whom the Commission has proceeded may seek injunctive relief from threatened harm under the same principles applicable to threatened illegal action by other administrative agencies.⁷⁷

In short, the Commission does not have exclusive jurisdiction within its sphere of competence. Existing and future judicial remedies are clearly preserved.

2. *De novo judicial review of Commission orders.* The third paragraph of article V, section 29 provides: "Appeals from final orders of the commission, including cease and desist orders and refusals

76. MICH. COMP. LAWS § 750.147 (1962); *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890). The discussion of the "judicial remedies" provision may be found in 2 RECORD 1999-2001, 2192-96, 2756-62. The debate clearly indicates that the primary intent was to preserve judicial jurisdiction in the civil rights field.

77. See, e.g., the remarks of Mr. Martin: "Mr. President, it seems to me that it should be clear that this does not permit a defendant to take his cause elsewhere unless his rights are in some way being violated. He doesn't get out of dealing with the commission simply because he starts an action in a court. If he takes the action to a court, it is because his due process is being violated in some way, and if that is true, then he has a case. If it isn't, he has no case and he can be in court but he is also still involved with the commission and the commission can proceed just as it otherwise would. . . . The fears that are being expressed are entirely imaginary and entirely unnecessary and the proponents of the amendments [seeking to eliminate the judicial remedies provision] have been frightened by ghosts which don't exist in this picture at all. . . ." *Id.* at 2761. For a general discussion of the availability of injunctive relief against proposed administrative action, see 3 DAVIS, ADMINISTRATIVE LAW TREATISE 545-616 (1958).

to issue complaints, shall be tried *de novo* before the circuit court having jurisdiction provided by law." Disappointed complainants, as well as losing respondents, are given a right to a trial *de novo* by this somewhat unusual provision which was added by a voice vote on third reading of the civil rights commission section. Delegate Higgs, the proponent of the *de novo* review provision, explained that the proposed language was a digest of the more lengthy judicial review provisions of Michigan's Fair Employment Practices Act. "The words 'de novo,' of course, mean a new trial. It means that a person who is really aggrieved has the opportunity to re-present his evidence before a court of law. . . ." ⁷⁸ Only three delegates spoke to the Higgs amendment before it passed by a voice vote; all three supported it in similar terms.

A minimum interpretation of the words "*de novo*," consistent with the provisions of the Fair Employment Practices Act, would require the reviewing court to exercise its independent judgment as to questions of fact, as well as law, on the record compiled before the Civil Rights Commission.⁷⁹ The difficulty with this view is that findings based on the credibility of witnesses (which are very important in the resolution of discrimination cases) are made by a trier who has neither seen nor heard the witnesses. A broader reading would require rehearing of the entire case, so that the court might enter its own findings of fact after hearing the witnesses. But this alternative involves the expense and inconvenience of a second trial whenever judicial review is sought. Whichever view is taken, the reviewing court should be limited to questions argued before the Civil Rights Commission or the administrative hearing will become a mere charade.

Under either view, of course, the scope of judicial review is very broad. The language subjecting findings and conclusions of the

78. 2 RECORD 3118. Mr. Higgs referred only to the judicial review provisions of the Fair Employment Practices Act and not to *Lesniak v. FEPC*, 364 Mich. 495, 111 N.W.2d 790 (1961) (decided several months before he spoke) in which the *de novo* review provisions of the act were held to be unconstitutional. The other three speakers, Messrs. Garvin, Martin, and Barthwell, also referred only to the statute and were seemingly unaware of the judicial reaction to it. Mr. Higgs has subsequently stated that he was unaware at that time that the statutory provisions upon which he modeled his amendment had been invalidated by a prior judicial decision. Letter from Milton E. Higgs to the author, September 4, 1964. The grounds relied on by the Supreme Court in the *Lesniak* case that the *de novo* review provisions were an unconstitutional delegation of administrative powers to the courts do not survive the inclusion of the *de novo* review language in the constitution itself.

79. Cf. MICH. COMP. LAWS § 423.308 (Supp. 1961). The former practice on appeals in equity cases provides an analogy. A trial *de novo*, in the equity sense, is based on the printed record of the decision below and cannot extend to issues not before, or passed upon by, the lower court. See *Moran v. State Banking Comm'r*, 322 Mich. 230, 33 N.W.2d 772 (1948); cf. *In re Fredericks*, 285 Mich. 262, 280 N.W. 464 (1938).

Civil Rights Commission to an independent redetermination by reviewing courts is yet another indication that the Commission's powers are non-exclusive and limited.

IV. THE CIVIL RIGHTS OF MICHIGAN RESIDENTS—1964

Prior to the effectiveness of the 1963 revised constitution, the civil rights of Michigan residents were embodied in constitutional provisions and legislative enactments dating back as early as 1850. In that year, a reference in the 1835 constitution,⁸⁰ limiting the franchise to "white" male citizens, was eliminated.⁸¹ The 1850 constitution also prohibited slavery and involuntary servitude in Michigan.⁸² A 1908 constitutional provision guaranteed the people "equal benefit, security and protection" of government.⁸³ A final constitutional provision, prohibiting "removal from or demotion in the state civil service . . . for partisan, racial or religious considerations," was adopted by amendment in 1940.⁸⁴

Other civil rights relating to racial, religious, and ethnic discrimination have been created by the legislature over the past hundred years. The first civil rights legislation was enacted in 1867; it prohibited racial segregation in public education.⁸⁵ In 1869, a statute prohibited life insurance companies that were doing business within the state from making any distinction or discrimination between white and colored persons.⁸⁶ The ban against miscegenation was removed in 1883.⁸⁷ In 1885, criminal sanctions were provided for denial of equal treatment in public places of accommodation, amusement, and recreation; racial discrimination in the selection and qualification of jurors was prohibited in the same year.⁸⁸ The Michigan Supreme Court rejected the "separate but equal" doctrine in 1890, and held that a civil action for damages could be brought for discriminatory treatment in a public accommodation.⁸⁹ The public accommodations statute was strengthened in 1937,⁹⁰ 1952,⁹¹ and 1956;⁹² the 1952 amendment extended cover-

80. MICH. CONST. art. 2, § 1 (1835).

81. MICH. CONST. art. 18, § 1 (1850).

82. MICH. CONST. art. 18, § 11 (1850).

83. MICH. CONST. art. 2, § 1 (1908). Identical language is now art. 1, § 1.

84. MICH. CONST. art. 6, § 22 (1940).

85. MICH. COMP. LAWS § 340.355 (Supp. 1961).

86. MICH. COMP. LAWS § 500.2082 (Supp. 1961).

87. MICH. COMP. LAWS § 551.6 (1948).

88. MICH. COMP. LAWS §§ 750.146-148 (1948).

89. *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890).

90. MICH. PUB. ACTS 1937, No. 117, at 185-86.

91. MICH. PUB. ACTS 1952, No. 101, at 112-13.

92. MICH. PUB. ACTS 1956, No. 182, at 337-38.

age to "government housing." Finally, in 1955, the Fair Employment Practices Act⁹³ created "a civil right" in "the opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry"⁹⁴ and established remedies for the enforcement of this right.⁹⁵ Domestic help and employers with less than eight employees were excluded from the coverage of the act.⁹⁶

Four provisions of the 1963 revised constitution manifest Michigan's continuing concern for the protection of civil rights. The education article contains a clause providing: "Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin."⁹⁷ This provision, although duplicative of federal rights stemming from the fourteenth amendment,⁹⁸ continues Michigan's historic legislative policy and "leaves no doubt as to where Michigan stands on this question."⁹⁹ A clause in the article dealing with public officers and employment carries forward the older constitutional prohibition of discrimination in public employment: "No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations."¹⁰⁰ This provision is also duplicative of federal guarantees.¹⁰¹

The two remaining constitutional provisions that deal with discriminatory denial of civil rights are the anti-discrimination declaration of article I and the civil rights commission provision of article V. If new civil rights were created by the revised constitution, their source must be found in the text of these two provisions.

A. *The Anti-Discrimination Declaration of Article I, Section 2 as the Source of New Civil Rights*

Article I, section 2 declares that the policy of the state is that "no person . . . shall . . . be discriminated against in the exercise [of his civil or political rights] because of religion, race, color or

93. MICH. COMP. LAWS §§ 423.301-.311 (Supp. 1961).

94. MICH. COMP. LAWS § 423.301 (Supp. 1961).

95. MICH. COMP. LAWS §§ 423.304, .307 (Supp. 1961).

96. MICH. COMP. LAWS § 423.302(b)(c) (Supp. 1961).

97. MICH. CONST. art. 8, § 2.

98. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

99. MICH. COMP. LAWS § 340.355 (Supp. 1961). The quotation is from MICHIGAN CONSTITUTIONAL CONVENTION, WHAT THE PROPOSED NEW STATE CONSTITUTION MEANS TO YOU 77 (1962), reprinted in 2 RECORD 3395.

100. MICH. CONST. art. 11, § 5.

101. Cf. *Slochower v. Board of Educ.*, 350 U.S. 551 (1956) (summary discharge of teacher in a college operated by a city for refusal to answer questions before a congressional committee violated fourteenth amendment); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (summary discharge of state employee on arbitrary grounds).

national origin." There are two major issues in the interpretation of this provision: (1) What application, if any, does the declaration have to discriminatory conduct on the part of private persons? And (2) what effect does the declaration have in the absence of legislative implementation?

1. *Scope of application of the declaration as it relates to private persons.* The constitutional language is susceptible of two interpretations. First, the declaration may merely reinforce existing federal guarantees against discriminatory *state* action which are embodied in the equal protection clause of the fourteenth amendment. This interpretation would be in accordance with the construction given to anti-discrimination declarations included in other states' constitutions.¹⁰² Moreover, it would prevent the declaration from being construed as effecting a far-reaching change in private legal relations.¹⁰³ On the other hand, a narrow interpretation of the language as applying only to *state* action, and not to *private* action, would deprive article I, section 2 of the constitution of any independent force or effect, other than as an authorization or exhortation for legislative action in the field of civil rights. Since the legislature already possesses this legislative power, the provision would be largely duplicative of federal guarantees established many years ago.

For these reasons, I think that a more generous interpretation is to be preferred. Private discriminatory action that denies a person his "civil and political rights" should be prohibited by the declaration. Of course, not every legal interest is a "civil or political right"; the declaration does not prohibit *all* conduct that may be motivated in part by racial, religious, or ethnic distinctions. The discrimination must deny a previously created "civil or political right" before it comes within the proscription.

2. *Effect of the declaration in the absence of legislative implementation.* The anti-discrimination clause is a declaration of state policy addressed to the legislature. It imposes a duty on the legislature to establish the civil rights deemed worthy of protection against racial, religious, and ethnic discrimination, to define the limits of these rights, and to create remedial machinery which will effectively enforce them. As a declaration of constitutional policy, it may have somewhat greater force than a mere exhortation to the legislature. If, for example, the legislature passed a law purporting to legitimize acts of private discrimination, a reviewing court might take

102. See text accompanying note 114 *infra*.

103. See text accompanying note 130 *infra*.

cognizance of the constitutional policy in passing on the validity of the statute. It is one thing for the state to leave acts of private discrimination untouched; it is quite another for the state to sanction discriminatory conduct explicitly, in the face of a contrary constitutional policy.

The evidence supporting this interpretation of the effect of the anti-discrimination declaration in the absence of legislative implementation may be summarized under three headings: (1) the language and history of the constitution; (2) the interpretation of similar provisions in federal and state constitutions; and (3) the revolutionary implications of a broad and self-executing anti-discrimination provision.

a. *The language and history of the anti-discrimination declaration.* The constitution does not purport to create an enforceable right to be free from all private acts of discrimination. Instead, it states a general policy and provides: "The legislature shall implement this section by appropriate legislation." The establishment of a Civil Rights Commission elsewhere in the constitution does not weaken the implication that the legislature is to delimit the rights and remedies that will be enforced by the Commission as well as by other agencies of government.

The journal of the convention contains overwhelming evidence that the framers did not intend to create new protections against private discrimination. Professor Pollock, Chairman of the Committee on Rights, Suffrage and Elections, dealt explicitly with the question in his remarks introducing the proposal which became article I, section 2.

"As a result of [the Committee's] deliberations on this matter, we have now come forth with a proposal which is more similar, I believe, to the recent Hawaiian proposal than to any other. We felt that, in the event we wanted to have a specific nondiscrimination clause, it would be better to state as a general policy of the constitution that there shall be no discrimination based on race, religion or national origin in the enjoyment of political or civil rights, and that the legislature should have the power to enforce this by appropriate legislation.

"This seemed to be the preferred type of nondiscrimination clause. It defines on the one hand the general policy of this state and also makes it clear that this is not a directly enforceable provision in regard to private persons, but will depend upon legislation which will then have to define what is meant by political and civil rights, the extent to which discrimination will be considered a violation and the appropriate sanctions to be applied. The majority of the committee considered this prefer-

able, both because, as a general proposition, constitutional limitations should serve to restrain governmental action and not to define private duties, and because the areas in which private discrimination should be forbidden, the extent to which discrimination is prohibited, and the sanctions to be applied are matters that we think are appropriately left for legislation."¹⁰⁴

Little would be accomplished by further discussion of the convention's consideration of the anti-discrimination declaration were it not that one aspect of the debate—the convention's rejection of a minority proposal referring to specific areas of discrimination—anticipated and influenced the convention's subsequent consideration of the civil rights commission proposal. Five Democratic members of the Committee on Rights, Suffrage and Elections, led by Professor Norris,¹⁰⁵ sought to substitute a more far-reaching proposal. This proposal contained a specific reference to the fields of "employment, housing, public accommodations and education" as areas in which "no person shall, because of his race, color, religion, national origin or ancestry, be discriminated against. . . ."¹⁰⁶ The accompanying minority report argued that rights to equal opportunity in employment, housing, public accommodations, and education were so fundamental in today's society that they should be declared in the fundamental law.¹⁰⁷ Apparently the intent of the minority was to create judicially enforceable rights to be free from racial, religious, and ethnic discrimination in the four enumerated areas, without any exceptions or limitations.

The second major feature of the minority proposal was that, unlike the majority proposal, it imposed a duty of non-discrimination upon private individuals and groups as well as upon public officials and state agencies.¹⁰⁸ The accompanying report emphasized that existing equal protection and civil rights provisions in federal

104. 1 RECORD 741-42.

105. Messrs. Norris, Dade, Hodges and Buback, and Mrs. Hatcher. *Id.* at 740.

106. *Ibid.*

107. *Id.* at 740-41. See also the remarks of Mr. Norris: "The first proposition contained in [the substitute proposal] and not expressed adequately in the committee proposal is the declaration of the right of all persons to equal opportunity to secure employment, housing, education and public accommodations as explicit political and civil rights. This explicit declaration in [the minority] proposal is for the purpose of specificity and enforceability, and this enumeration does not connote limitation. You will note in Professor Pollock's statement that he felt that this ought to be left to the legislature. It is the submission of those who have subscribed to this report . . . that we ought to spell out these rights in specific form." *Id.* at 742.

108. As Mr. Norris said, in explaining the minority proposal: "The second proposition contained in [the minority proposal] and not adequately expressed in the committee proposal is the imposition of a duty of nondiscrimination on private as well as public or state agencies in the exercise or enjoyment by all persons of political and civil rights." *Ibid.*

and state constitutions extended only to discrimination by public agencies, and not to acts of discrimination by private persons or groups. Under the minority proposal, private discrimination was proscribed when it interfered with the enjoyment by other individuals of their rights to equal opportunity to secure employment, housing, public accommodations, and education. "[I]t is fitting and necessary," the report stated, "that the largest agency of discrimination, present and future, namely that of private conduct, be the subject matter of constitutional attention."¹⁰⁹

The respective merits of the majority and minority proposals were then discussed at some length. Ten members of the convention spoke in support of each proposal. Their remarks reveal a clear understanding that the majority proposal did not create new rights or impose new duties in situations of private discrimination. Again and again it was stated that the majority proposal, unlike that of the minority, was not self-implementing but would require legislative action before it would affect private persons. Moreover, a substantial number of delegates either supported or attacked the majority proposal on the specific ground that, unlike the minority substitute, it would not affect discrimination in private housing.¹¹⁰

Thus the issues were squarely posed for the delegates. Two proposals were placed before them: one, supported by the Republican majority, did not affect private discrimination but left the problem for legislative solution; the other, advanced by a group of Democratic delegates, would have imposed a duty of nondiscrimination on all citizens. The proposals were supported and criticized on these precise grounds.¹¹¹ The convention rejected the minority

109. *Id.* at 741.

110. See, e.g., *id.* at 747-49 (remarks of Messrs. Leppien, Bentley, and Downs).

111. Two illustrations will indicate the clarity with which the opposing positions were drawn. Delegate Murphy stated that he favored the minority proposal because it "covers discrimination by individuals, firms, corporations, and labor organizations. Individuals may be discriminated against by the state, on the one hand, or by private conduct on the other." *Id.* at 747. After explaining that present law did not provide protection against private discrimination, Mr. Murphy concluded:

"I submit to you the proposition that to proscribe state discrimination while at the same time permitting private discrimination is to make one only half free. Consequently, to bring about . . . [equality], the state must bridge the gap by prohibiting private conduct which discriminates on the basis of race, color, religion or national origin." *Ibid.*

Mr. Murphy concluded his statement with the argument that it would be proper for the state to curtail individual freedom in the use of property in order to remedy the social evil of discrimination and to provide those discriminated against with greater rights.

Mr. Murphy's clear exposition of the difference between the majority and minority proposals does not stand alone. Immediately after he had finished, Mr. Leppien spoke in defense of the right of the individual homeowner to dispose of his property as he saw fit, a right which he thought would be improperly curtailed by the minority

proposal by a vote of eighty to fifty¹¹² and, then, unanimously adopted the majority proposal,¹¹³ which became article I, section 2 of the revised constitution.

b. *The interpretation of similar provisions in federal and state constitutions.* The delegates at the Michigan Constitutional Convention were aware that the fourteenth amendment of the United States Constitution has only a limited self-executing effect. The amendment is self-executing in the sense that a court, in determining a case or entering a judgment, cannot overstep the bounds that it provides; but it is not self-executing in the sense that private rights of action against state officials stem directly from it. Thus a court must consider and apply the constitutional limits on state action contained in the due process and equal protection clauses whenever, in a case properly before the court, the action or judgment of the court would itself violate these constitutional limitations.¹¹⁴ Otherwise, the court would itself participate in a denial of due process or equal protection. On the other hand, the fourteenth amendment does not of its own force create broad private rights of action against state officials who are alleged to have violated its commands. In the absence of statutory implementation, an individual cannot maintain a damage action for violation of fourteenth amendment rights.¹¹⁵ The availability of injunctive relief against official action is more likely, but still uncertain. Because the Federal Civil Rights Acts¹¹⁶ often provide a remedy, there has been little necessity to

proposal. He commented that evolution was perhaps necessary in this area; an advantage of the majority proposal was that it "leaves the details to be expanded" by the legislature, which would be free "to go even beyond the restricted clauses found in the minority report." *Ibid.*

112. *Id.* at 750.

113. *Id.* at 760.

114. *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948). Enforcement cases—those in which the government seeks to impose civil or criminal penalties on a defending individual—provide the typical illustration. See the illuminating discussion in Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371-83 (1953), reprinted in HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312, 319-25 (1953).

115. *Fisher v. City of New York*, 312 F.2d 890 (2d Cir.), *cert. denied*, 374 U.S. 828 (1963) (claim under fourteenth amendment to recover damages for wrongful conviction and incarceration did not state a claim upon which relief can be granted); *cf. Wheeldin v. Wheeler*, 373 U.S. 647 (1963) (unauthorized use of subpoenas by legislative investigator held not to violate the fourth amendment or to support a damage action); *Bell v. Hood*, 71 F. Supp. 813 (S.D. Cal. 1947) (claim under fourth and fifth amendments to recover damages for wrongful search and seizure by FBI officers dismissed for failure to state a cause of action). Actions against state officials for money damages may also present a sovereign immunity problem.

116. Civil Rights Act of 1866, 14 Stat. 27; Enforcement Act of 1870, 16 Stat. 140; Civil Rights Act of 1875, 18 Stat. 335; Civil Rights Act of 1957, 71 Stat. 634; Civil Rights Act of 1960, 74 Stat. 86.

determine whether the fourteenth amendment, of its own force, authorizes federal or state courts to grant injunctive relief against actual or threatened governmental action that allegedly violates the due process or equal protection clauses.¹¹⁷

The draftsmen of the anti-discrimination declaration drew on the similar constitutional provisions of Hawaii, Alaska, New Jersey, and New York;¹¹⁸ hence, the interpretation of these provisions is a relevant consideration. The Hawaii provision, adopted as part of the 1950 constitution which became effective when Hawaii was admitted to statehood, is most similar to the Michigan language: "No person shall . . . be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."¹¹⁹ Although the provision has not been given a definitive judicial construction, the report accompanying its submission to the Hawaii Constitutional Convention indicates that it was intended to be a reaffirmation of the equal protection clause of the fourteenth amendment, which "was designed to prevent a state from making discriminations between its own citizens . . ."¹²⁰

The 1948 New Jersey Constitution contains somewhat similar language: "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."¹²¹ Although not phrased in traditional language, it has been construed as an equal protection clause by the New Jersey court.¹²² New Jersey decisions hold that the provision prevents discriminatory state action in public housing,¹²³ but does not impose judicially enforceable duties on private persons.¹²⁴

117. A quick and incomplete search has not produced a case in which injunctive relief against state action was predicated solely on the fourteenth amendment grounds without invoking federal remedies under the Civil Rights Acts or state remedies under state statute or common law.

118. 1 RECORD 740 (report accompanying Committee Proposal 26).

119. HAWAII CONST. art. 1, § 4 (1950).

120. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII, JOURNALS AND DOCUMENTS 164 (1950).

121. N.J. CONST. art. 1, § 5.

122. *Washington Nat'l Ins. Co. v. Unemployment Compensation Bd.*, 1 N.J. 545, 64 A.2d 443 (1949) (exclusion of all insurance agents except "industrial life insurance agents" from unemployment compensation coverage held an arbitrary classification violating state and federal equal protection provisions).

123. *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954) (racial segregation in public housing).

124. *Mills v. City of Philadelphia*, 52 N.J. Super. 52, 144 A.2d 728 (1958) (testatrix's provision for white children upheld, although city could not administer the trust); cf. *Rich v. Jones*, 142 N.J. Eq. 215, 59 A.2d 839 (1948) (enforcing, prior to *Shelley v. Kraemer*, a restrictive covenant).

The New York experience is even more illuminating. The 1938 New York Constitution contains a provision that reads in part: ". . . No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."¹²⁵ The minority anti-discrimination provision, submitted by Mr. Norris, was modeled on this provision, employing very similar language. New York's anti-discrimination declaration received an authoritative judicial construction in *Dorsey v. Stuyvesant Town Corp.*,¹²⁶ in which three Negroes sought an injunction against a large housing project to restrain it from refusing to rent apartments to them and others because of their race. The principal holding in the case—that a housing project receiving extensive state aid and assistance under a redevelopment statute is not engaged in state action within the fourteenth amendment—would undoubtedly be decided differently today as a matter of federal law.¹²⁷ A second holding, however, involved the interpretation of the anti-discrimination declaration in New York's constitution. After indicating that the state's equal protection clause, like its federal prototype, was applicable only to state action, the court turned to the anti-discrimination declaration:

"The second sentence of section 11 is a civil rights clause and, although applicable to private persons and private corporations, protects only against 'discrimination in . . . civil rights.' [Omission in original.] Obviously such rights are those elsewhere declared. Again this conclusion is strongly supported by the statement of the chairman of the Bill of Rights Committee made at the convention to the effect that the provision in question was not self-executing and that it was implicit that it required legislative implementation to be effective. [Citation omitted.] Furthermore, it was stated at the convention that the civil rights protected by the clause in question were those already denominated as such in the Constitution itself, in the Civil Rights Law or in other statutes [citation omitted]. . . . No statute in New York recognizes the opportunity to acquire interests in real property as a civil right, although there are in existence today nearly twenty anti-bias laws covering many fields of activity."¹²⁸

Subsequent New York cases have consistently taken the position

125. N.Y. CONST. art. 1, § 11.

126. 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

127. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), where the test for state action is stated to be whether the state, to a significant extent, is involved in private conduct.

128. 299 N.Y. at 531, 87 N.E.2d at 548-49 (1949).

that extensions of civil rights under the New York anti-discrimination declaration must be by legislative enactment; and a gradual extension has in fact taken place.¹²⁹

The parallel to the Michigan situation—in which the chairman of the responsible committee made similar representations—is striking. Moreover, in the Michigan anti-discrimination provision, unlike those of New York, Hawaii, and New Jersey, the requirement of legislative implementation is not left to implication but is expressly included. It is noteworthy that language as broad as that contained in the Michigan minority proposal was held in New York not to create enforceable rights against private persons in the absence of legislative implementation.

c. *The revolutionary implications of a broad and self-executing anti-discrimination provision.* If the anti-discrimination declaration were to be construed as placing enforceable duties on all persons not to discriminate in their relations with other persons, a fundamental change in the legal order would be accomplished. The constitutional language is without limits, and, if the ban extends to private acts that interfere with the enjoyment of legally protected interests of others, it brooks no exceptions. Domestic help, private associations, sororities at private universities, the single roomer in a private home—discrimination in these and other sensitive situations would be proscribed, and private rights of association would be severely constricted. Nor could the legislature modify or reduce the constitutional command by marking out exceptions.

“Not lightly vacated,” Judge Cardozo said, “is the verdict of quiescent years.”¹³⁰ Traditional patterns of legal relations or a long-standing custom *can* be overthrown by abrupt innovation, but a strong justification is required. “If a thing has been practised for two hundred years by common consent,” said Mr. Justice Holmes in applying the fourteenth amendment to a challenged state statute, “it will need a strong case for the Fourteenth Amendment to affect it. . . .”¹³¹ Constitutional language will not be read to accomplish

129. The development of New York law in the housing area may be traced in *Kates v. Lefkowitz*, 28 Misc. 2d 210, 216 N.Y.S.2d 1014 (Sup. Ct. 1961); *State Comm'n Against Discrimination v. Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958); and *Globerman v. Grand Cent. Parkway Gardens*, 115 N.Y.S.2d 757 (Sup. Ct. 1952), *aff'd*, 281 App. Div. 820, 118 N.Y.S.2d 917 (1953).

130. *Coler v. Corn Exch. Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884 (1928) (long-standing statutory procedure for seizure of property of absconding husband or father upheld against due process attack).

131. *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (state statute providing for damages to owners of a party wall only upon proof of negligence held not violative of due process).

fundamental changes in the legal order unless the language, viewed in its context, calls for such a result.¹³² In *Minor v. Happersett*,¹³³ wherein it was held that the definition of citizenship in the fourteenth amendment did not impliedly grant women the right to vote, Mr. Chief Justice Waite relied on this "policy of clear statement": "In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared."¹³⁴

The anti-discrimination provision of article I does not spell out an intent to make an abrupt change in the legal order; nor does the record of the convention reveal an intent to proscribe private acts of discrimination. Materials placed before the electorate during the ratification campaign may be examined in vain for any hint or warning that a change of this magnitude was intended.¹³⁵ If the constitutional language were now given such a latitudinarian interpretation, the people might well feel misled.

B. *The Civil Rights Commission Provision as the Source
of New Civil Rights*

If new civil rights were not created by the anti-discrimination declaration of article I, they must—if they exist—find their origin in the civil rights commission provision of article V. In particular, they must stem from the single sentence in that provision that specifies the substantive responsibilities of the Commission:

"It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination."

132. Cf. *Common Council v. Engel*, 202 Mich. 536, 543, 168 N.W. 465, 467 (1918) (invalidating a statute relating to Detroit school bonds as violative of a constitutional provision preventing "local acts" from becoming effective without a local referendum): "This very question of local legislation as applied to education was under consideration in the constitutional convention and debated . . . Had it been the sense of the convention that so important a subject as education should be excepted from the inhibition of section 30, it could, and presumptively would, have been so provided in unequivocal terms. So far as a failure to do so after the attention of the convention was called to the subject aids construction, it is persuasive that such was not the intention."

133. 88 U.S. (21 Wall.) 162 (1874).

134. *Id.* at 173.

135. See text at notes 163-68 *infra*.

This sentence has already received a preliminary analysis.¹³⁶ The conclusion was reached that the constitutional language does not authorize the Commission to correct whatever racial, religious, or ethnic discrimination it believes should be eliminated. The Commission is "to secure" against racial, religious, and ethnic discrimination only "the civil rights guaranteed by law and by this constitution." The mere statement that the Commission is "to secure" "civil rights," whatever their content, does not mean that "rights" are thereby created. The journal of the convention and the materials submitted to the electorate during the ratification campaign, as well as the text of the document, reveal that the civil rights commission provision was an implementing provision, designed to assist in the enforcement of rights elsewhere created; it did not establish or create any new "civil rights."

1. *The historical record.* About one hundred tightly-packed, double-column pages in the convention journal are required to reproduce the discussion of the civil rights commission provision. Within these pages there is much, of course, that is repetitious, irrelevant, and contradictory. But the task of interpretation is not to find, in a giant haystack, the needle that supports a conclusion that one desires to reach; rather, it is one of discovering the meaning and purpose of the words chosen. The debates, it must be remembered, were not submitted to the electorate; the people, when they voted, had before them only the constitutional language, the *Address to the People*, and explanations and arguments expressed during the ratification campaign. The debates have only a limited relevance to the problem of constitutional interpretation—they may be examined to gain an impression of the thrust or the purpose of language that is ambiguous when fairly viewed.¹³⁷

The debates, viewed in their entirety, corroborate the views advanced in this article. There was, from beginning to end, a coherent

136. See text at notes 50-53 *supra*.

137. The purpose of constitutional language may be illuminated by examining the proceedings of the constitutional convention. *Kearney v. Board of State Auditors*, 189 Mich. 666, 671, 155 N.W. 510, 511 (1915). But such materials must be used with care for, as Justice Cooley said, they are "commonly vague and inconclusive":

"Where the statute is plain and unambiguous in its terms, the courts have nothing to do but to obey it. They may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern. . . ."

"These rules are especially applicable to constitutions; for the people, in passing upon them, do not examine their clauses with a view to discover a secret or double meaning, but accept the most natural and obvious import of the words as the meaning designed to be conveyed. . . ." *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 165-68 (1865) (concurring opinion of Cooley, J.).

notion of what the substantive responsibilities of the Civil Rights Commission were to be. Although the provisions governing the composition and powers of the Commission went through a considerable evolution and expansion on the floor of the convention, the substantive responsibility of the Commission "to secure the protection of the civil rights guaranteed by [law and by] this constitution" remained almost unchanged.¹³⁸ There was extensive discussion of the scope and nature of the "civil rights" included within this charter. Such rights included constitutional protections against racial discrimination, both those stemming from the federal constitution and those which were to be included in the revised constitution; they included the statutory civil rights to be free from discriminatory treatment in public accommodations,¹³⁹ public housing,¹⁴⁰ and employment.¹⁴¹ They did not include discriminatory conduct in the private housing market or in other areas, since rights protecting individuals from racial and other discrimination therein did not yet exist. Attempts to broaden the language to create, largely by implication, new civil rights were repeatedly rejected.

One important exchange will illustrate these points. Delegate Leibrand asked Mr. Martin, chairman of the committee that had advanced the civil rights commission proposal, "what specific rights or claimed rights does your committee consider to be embraced in the term 'civil rights' as used in the proposed amendment?"¹⁴² Mr. Martin's reply, on behalf of the committee, was as follows:

"Judge Leibrand, the answer to your question, I think, is this: this involves the rights of the citizen to not be discriminated against in a number of fields. The first of those, of course, is education, the right to get the kind of education which the individual can afford and which he wants to have, whether that might be in a profession or as a teacher or as a secretary or as a nurse, or whatever that might be. Second, it involves the right to nondiscrimination in those areas which are covered by the public nondiscrimination act which covers restaurants, motels, places of amusement, stores, public conveyances, theaters, bowling alleys, and places of public accommodation. Third, it covers employment—the right to nondiscrimination in the field of employment. Fourth, it covers nondiscrimination in the field of voting—the citizen's right to cast his vote and not to be deprived of his franchise. And fifth, it involves his right to buy housing

138. Compare the original Civil Rights Commission proposal, 2 RECORD 1921-22, quoted above, with the final language of MICH. CONST. art. 5, § 29.

139. MICH. COMP. LAWS §§ 750.146-.147 (1948).

140. *Ibid.*

141. MICH. COMP. LAWS §§ 423.301-.311 (Supp. 1961).

142. 2 RECORD 1934.

where he can afford it and without discrimination in that field by public agencies or by those licensed by the state. It involves the question of discrimination in all of these fields, and the rights which would be protected by such a civil rights commission would be protected by those rights which are specified in the constitution."¹⁴³

The rights specified, of course, are those which already existed by statute or by constitutional provision: public education,¹⁴⁴ public accommodations,¹⁴⁵ employment,¹⁴⁶ public housing,¹⁴⁷ and voting.¹⁴⁸ In connection with the public accommodations field, Mr. Martin referred explicitly to the statute. The reference to discrimination in housing "by those licensed by the state" undoubtedly refers to Rule 9 of the Corporation and Securities Commission,¹⁴⁹ which was promulgated in 1960 and declared invalid by the Michigan Supreme Court in February 1963,¹⁵⁰ some ten months after the date of Mr. Martin's comments to the convention.

A later exchange between Judge Leibrand and Mr. Van Dusen, who, like Mr. Martin, played an instrumental role in the fashioning of the civil rights commission provision, indicates that the language should be given its natural meaning. Judge Leibrand asked Mr. Van Dusen "who then will be the actual judge of the specific duties" of the Commission?¹⁵¹ Mr. Van Dusen replied: "... the duties of the commission are prescribed in the constitution. They are to secure the protection of the civil rights guaranteed by law and this constitution. If there is any question about what securing the protection of the civil rights guaranteed by law and by this constitution means, presumably the question would have to have judicial determination. I think it is reasonably clear."¹⁵² Surely Mr. Van Dusen would have said something more if the intent had been to create dramatic new civil rights. His conviction that the language "is reasonably clear" indicates that it should be given a natural, not a revolutionary, construction.

The unsuccessful efforts of a minority of delegates, principally

143. *Ibid.*

144. MICH. CONST. art. 8, § 2.

145. MICH. COMP. LAWS §§ 750.146-147 (1962).

146. MICH. COMP. LAWS §§ 423.301-311 (1960).

147. MICH. COMP. LAWS § 750.146 (1962).

148. See the materials cited notes 80-81 *supra*.

149. MICH. AD. CODE § R 451.309 (Supp. 1960).

150. *McKibbin v. Corporation & Sec. Comm'n*, 369 Mich. 69, 119 N.W.2d 557 (1963). Rule 9 defined racial, religious, and ethnic discrimination by licensed real estate brokers in any real estate transaction as "unfair dealing" which would subject the broker to license revocation.

151. 2 RECORD 1979.

152. *Ibid.*

Democrats, to broaden the sentence defining the substantive responsibilities of the Commission also is highly relevant. The minority proposal, which will be referred to as the "Austin proposal," would have changed the sentence in question to read as follows:

"It shall be the duty of the commission, in a manner which may be prescribed by law, to investigate violations of, and to secure the protection of the civil right to employment, education, housing, public accommodations, and to such other civil rights as provided by law and the constitution."¹⁵³

There was serious question concerning the meaning and scope of "the civil right to employment, education, housing, and public accommodations." Some delegates either attacked the Austin proposal or supported it on the ground that it would create new civil rights;¹⁵⁴ others, including its principal proponent, denied that it would have the effect of creating new civil rights.¹⁵⁵ The majority of delegates was not required to resolve the question of what effect the substitute language would have, since all attempts to incorporate it were rejected.

The views of Mr. Austin concerning the meaning of his proposal are significant:

"I am going to suggest that we adopt the [Van Dusen] substitute, including those weakening changes, with one exception, and that is that we reinsert reference to the major fields of discrimination. I feel that this is a must. They do not create any new rights. They are not enumerated elsewhere in the constitution. The executive committee enumerated them in its report¹⁵⁶ and the courts may construe omission as indicating that we do not intend the scope of the commission to extend to all of these major fields of discrimination."¹⁵⁷

After Mr. Van Dusen had indicated, in reply to a question, that omission of reference to the four areas would not prevent the Commission from dealing with these four areas (implicitly assuming that the legislature had created civil rights therein, as it had in all four of the enumerated areas), delegate Higgs put the issue directly to Mr. Austin:

153. *Id.* at 1982.

154. See *id.* at 1982-86.

155. *E.g., id.* at 2186 (Mr. Austin); *id.* at 1986 (Mr. Everett's remarks expressing doubt over the meaning of the Austin language).

156. As Mrs. Hatcher explained in her clarifying remarks, Mr. Austin was referring to the report of the Committee of Rights, Suffrage and Elections relating to the anti-discrimination provision, not to a report of the Committee on the Executive Branch. *Id.* at 2187.

157. *Id.* at 2186.

"MR. HIGGS: My question is this: is it your intent in inserting this language to create any civil rights or to define any civil rights beyond the civil rights presently guaranteed by law or by this constitution in other sections?

"MR. AUSTIN: Mr. President, Mr. Higgs, it is not our intention [speaking for the proponents of his amendment as well as himself] to create any new rights, only to focus attention on the fields in which we have discrimination."¹⁵⁸

Then Mr. Higgs summed up his own conclusions:

"Real progress in this field will only come through the broadest support, not only on the part of the delegates here assembled but upon the part of the people of the state of Michigan who will be called upon to pass upon the work we do. It will not come by partisan bickering, by appeals to prejudice in the name of civil rights, or any such emotional reasons. I urge that you vote against this because it is unnecessary. I think it may raise questions that are not intended to be raised and I think if you believe in the real sincerity of this purpose, you will oppose it."¹⁵⁹

A few moments later, after a speech by Mrs. Elliott, the convention rejected the Austin proposal by a vote of seventy-three to forty-four.¹⁶⁰

At this late date it is impossible to determine whether the delegates took Mr. Austin's remarks at face value (and therefore thought the language was unnecessary because it did not create any new rights) or whether, like Mr. Higgs, they feared that the additional language might have the effect of creating new rights. Nor is it necessary to fathom the motives of individual delegates. The action of the delegates comes through loud and clear: the convention intended neither to create new civil rights nor to adopt language that might be susceptible of that construction.

2. *The appeal to the electorate.* The people, when they ratified the revised constitution, acted on the basis of the materials placed before them: the constitutional text, the explanatory comments in the *Address to the People*, and the comments and arguments of proponents and opponents. These materials may properly be consulted to determine the understanding which the people may have had concerning the scope and meaning of the civil rights commission proposal.¹⁶¹

158. *Id.* at 2188.

159. *Ibid.*

160. *Id.* at 2189.

161. *Kearney v. Board of State Auditors*, 189 Mich. 666, 671, 155 N.W. 510, 511 (1915).

The *Address to the People*, unfortunately, does not provide additional light, since its explanation of article V, section 29 is limited to a bland paraphrase of the constitutional text.¹⁶² The same is true of much of the literature circulated during the ratification campaign. But a number of important statements went into more detail concerning the meaning of the civil rights commission provision. The available materials uniformly corroborate the views here advanced. On the other hand, I have not discovered a single statement by anyone to the effect that the constitution created new civil rights in such areas as private housing or that the Civil Rights Commission was to have plenary and exclusive powers to deal with problems of racial discrimination.

During the ratification campaign, delegates to the convention made a number of statements explaining the meaning of the Civil Rights Commission provision. For example, a group of delegates, in a brochure discussing the constitutional provisions in the civil rights field, defined in detail the "civil rights" to be enforced by the Commission: "The Constitution does not attempt to define the civil rights that are protected against discrimination. The term will include any rights specifically mentioned in the Constitution and those specified and defined by statute."¹⁶³ The brochure then listed some of the existing constitutional and statutory provisions and predicted: "Similar legislation would implement equal protection of the laws with respect to such matters as housing and the administration of justice."¹⁶⁴ Delegate William B. Cudlip, in an article in a legal journal, replied to attacks on the civil rights commission provision: ". . . it is a basis of objection by opponents who urge its deficiency because it fails to define some civil rights as employment, education, housing and public accommodations. These are essentially individual versus individual rights and are matters for statutory law. Eminent scholars in the field of constitutional law advise that the inclusion of such specifics in a constitution is defeating."¹⁶⁵ Similarly, delegate Harold Norris, a leading proponent of the minority proposals concerning civil rights, attacked the civil rights commission provision be-

162. MICHIGAN CONSTITUTIONAL CONVENTION, WHAT THE PROPOSED NEW STATE CONSTITUTION MEANS TO YOU 53-54 (1962), reprinted in 2 RECORD 3383-84.

163. Delegates Pollock, J. H. Hannah, Cudlip, Mosier, Lawrence, Cushman, Judd, Martin, & McCauley, Your Individual Rights in the New Constitution 4-5 (undated brochure circulated prior to April 1963 election).

164. *Id.* at 5.

165. Cudlip, *The Proposed Constitution Should be Approved*, 31 DETROIT LAW. 7, 8 (1963). The reference to the recommendations of eminent scholars included the comments of Professor Paul G. Kauper, University of Michigan Law School, in several memoranda submitted to committees of the convention.

cause, among other things, "The civil rights to be protected, and against whom, public or private, are not explicitly declared or protected. . . . The provision is not self-executing and will require implementation by an unrepresentative Legislature whose inaction caused the proposed provision."¹⁶⁶

Materials circulated by a number of organizations during the ratification campaign expressed the same views. A comprehensive booklet prepared by a non-partisan research organization took great pains to point out that the new constitution would not impose enforceable duties on private persons:

"The enumeration and definition of rights in the field of individual relationships have traditionally rested, however, with statute law (legislative prescription) and have not commonly been taken note of in constitutional law. Thus, the reluctance of the Convention to enter the field of social and economic rights of individuals, leaving this to the legislature, extends the reliance on a tradition solution.

"The creation of a bi-partisan civil rights commission in the revised constitution established the machinery by which the protection of federal and state laws on individual rights may be implemented. . . .

"Some object that the provision for a civil rights commission does not go far enough in specifically including exact language regarding such things as employment, housing, public accommodations and education.

"As previously noted, this is left to legislative decision under the theory that constitutional civil rights is a matter of people protected from government, while problems of individual-versus-individual are more properly a matter for statute law."¹⁶⁷

Similarly, organizations opposing the new constitution argued that the Civil Rights Commission was "a powerless agency" because the constitution "fails to spell out that the proposed commission can deal with the really vital problems of employment, education, housing, or public accommodations."¹⁶⁸

C. *The Attorney General's Opinions*

In 1963, prior to the effectiveness of the revised constitution, Michigan Attorney General Frank J. Kelley issued three legal opinions concerning the powers and procedures of the Civil Rights

166. Norris, *Six Serious Weaknesses [of the Civil Rights Commission Proposal]*, Detroit Free Press, Feb. 24, 1963, p. 3-B, col. 4.

167. Citizens Research Council, *A Digest of the Proposed Constitution*, Report No. 213 at 10-11, Nov. 1962.

168. The Citizens Committee To Defend Michigan's Constitution. *Here's How the Proposed Michigan Constitution Hurts You 7* (undated brochure circulated prior to April 1963 election).

Commission.¹⁶⁹ The Attorney General's views are deserving of careful attention because of the authoritativeness of their source and because they have been widely publicized and accepted. Governor Romney has stated that he agrees with the Attorney General,¹⁷⁰ and members and staff of the Civil Rights Commission have made public statements along the same line.¹⁷¹

First, the Attorney General believes that article V, section 29, assisted in an uncertain manner by the anti-discrimination declaration of article I, created extensive civil rights which protect individuals from private discrimination on racial, religious, and ethnic grounds in the fields of employment, education, housing, and public accommodations. As the Attorney General put it:

"From a plain reading of Article V, section 29, it is clear that the people have conferred *plenary* power upon the Civil Rights Commission in *its sphere of authority* as a constitutional commission to investigate and to secure the enjoyment of civil rights without discrimination.

". . . [E]qual opportunity to housing, both public and private, is a civil right protected by the Revised Constitution and . . . the investigation of alleged discrimination of this civil right has been vested by the people in the Civil Rights Commission under Article V, Section 29 of the Revised Constitution.

"All of the foregoing is a clear expression of the public policy of this State."¹⁷²

Second, the Attorney General maintains that the legislature's powers to deal with problems of racial discrimination have been greatly restricted. Again and again, he has stated that the Commission has "plenary"¹⁷³ power in its sphere of authority to protect civil

169. OPS. MICH. ATT'Y GEN. No. 4161 (July 22, 1963); *id.*, No. 4195 (Oct. 3, 1963); and *id.*, No. 4211 (Nov. 18, 1963).

170. See, e.g., Detroit Free Press, July 27, 1963, p. 3-A, col. 8: "Governor Romney told Michigan mayors Friday their citizens no longer have a choice between segregated and integrated housing. . . . After expressing agreement with the Attorney General Frank Kelley's interpretation of the Commission created by the new Constitution, Romney said: 'As far as I'm concerned we're going to have universal application and enforcement of State law.'"

171. E.g., Ann Arbor News, May 6, 1964, p. 21, col. 2-3: "Judge Feikens [co-chairman of the Civil Rights Commission] said the commission is operating on the assumption that it will have power to eliminate discrimination in all housing transactions, and stated in response to an audience question, that this power would extend to renting of a single room." See also the reported statements of the Commission's Executive Director. Detroit Free Press, May 31, 1964, p. 3-A, col. 8: "[Executive Director Gordin] said an opinion last July by Attorney General Frank J. Kelley that his commission has 'plenary power' means it has pre-empted the civil rights field from the Legislature and local lawmakers."

172. OPS. MICH. ATT'Y GEN. No. 4195, at 2-3 (Oct. 3, 1963). The first paragraph is a quotation from the earlier opinion of July 22, 1963.

173. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1963) defines "plenary" as

rights. "The legislature," he has said, "cannot decrease or abrogate the constitutional powers of the Civil Rights Commission."¹⁷⁴ Later he added: "I find no authority in the Constitution under which the legislature could abrogate or limit in any way the power of the Civil Rights Commission in the fields of employment, education, housing and public accommodations."¹⁷⁵ Moreover, the constitutional provision authorizing legislative suspension of administrative rules is inapplicable to the Commission.¹⁷⁶ He did indicate, however, that the legislature, which is obligated to appropriate funds for the effective operation of the Commission, does possess the limited power to "prescribe the mode or manner in which investigations are to be conducted by the Civil Rights Commission."¹⁷⁷

Finally, the Attorney General's emphasis on the "plenary" and "exclusive" nature of the Commission's constitutional powers has led him to the further conclusion that local governments, as well as the legislature, are excluded from the areas occupied by the Commission. Under this view, municipal ordinances that seek to create or enforce civil rights in the field of private housing are invalid because the Civil Rights Commission has preempted the field.¹⁷⁸ However,

"complete in every respect: absolute, perfect, unqualified." It is apparent from the context that the Attorney General is using the word in this sense. At one point he substitutes "exclusive" for "plenary." OPS. MICH. ATT'Y GEN. No. 4161, at 15 (July 22, 1963).

174. *Id.* at 5.

175. *Id.* at 17.

176. *Id.* at 19-20.

177. *Id.* at 17-18.

178. OPS. MICH. ATT'Y GEN. No. 4195 (Oct. 3, 1963). Two Michigan cities have adopted fair housing ordinances. On September 16, 1963, Ann Arbor enacted an ordinance forbidding discrimination in buildings containing five or more units or in buildings or lots comprising part of five or more dwellings owned by or subject to the control of any one person. ANN ARBOR, MICH., ORDINANCE CODE ch. 112, §§ 9.151-.160 (1963). The Ann Arbor Human Relations Commission is responsible for its administration, and violation is punishable by a fine of one hundred dollars or ten days imprisonment for nonpayment of the fine. On December 23, 1963, the city of Grand Rapids adopted a similar ordinance applicable to three or more buildings or units. Grand Rapids, Mich., Ordinance 1628, Dec. 23, 1963. The validity of the Ann Arbor ordinance has been attacked on pre-emption and other grounds, but the litigation has not reached a conclusion. *City of Ann Arbor v. Hubble*, Docket No. CR373, Washtenaw County Cir. Ct. (action commenced June 11, 1964).

Courts in several states have upheld municipal ordinances forbidding racial discrimination in the housing market against attacks that state legislation has pre-empted the field. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953) (sustaining validity of D.C. ordinances dealing with discrimination in places of public accommodation); *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. 1962) (upholding the validity of Kansas City's public accommodations ordinance); *Martin v. City of New York*, 22 Misc. 2d 389, 201 N.Y.S.2d 111 (Sup. Ct. 1960) (sustaining New York City's fair housing ordinance); *Stanton Land Co. v. City of Pittsburgh*, 8 RACE REL. L. REP. 1580 (Allegheny County C.P., 1963) (upholding the validity of Pittsburgh's fair housing ordinance). *Contra*: *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P.2d 773 (1944). See generally, Pearl & Terner, *Survey: Fair Housing Laws—Design for*

a municipal ordinance which has no enforcement machinery, but which seeks only to persuade, counsel, and educate, is valid; municipalities, according to the Attorney General, may establish a body empowered to conduct investigations in the civil rights area and to carry on conciliation and educational activities.¹⁷⁹

1. *The argument based on interpreting the term "civil rights" as all legally protected interests.* A substantial portion of the Attorney General's first opinion is devoted to defining "the basic civil rights which are inherent and derived from citizenship in a particular body politic."¹⁸⁰ The opinion includes in this category the nondiscrimination rights established in employment, public education, public accommodations, and public housing by various Michigan statutes and constitutional provisions.¹⁸¹ Turning to the area of private housing, the Attorney General, after quoting from *Shelley v. Kraemer*,¹⁸² concludes:

"Thus, it is clear that the [Federal] Civil Rights Act of 1866 creates a civil right to inherit, purchase, lease, sell, hold and convey real and personal property. It is significant to note that the Civil Rights Act of 1866 draws no distinction between public and private housing. Consequently, one must conclude that Congress intended to create a civil right in the area of private housing as well as public housing."¹⁸³

I must confess to some shock and disbelief when I first read this passage. It is hornbook law that the fourteenth amendment—and hence all legislation enacted pursuant to it—protects only against *state* action and does not extend to discriminatory acts of private persons.¹⁸⁴ Moreover, this proposition is stated in the most forth-

Equal Opportunity, 16 STAN. L. REV. 849, 882-99 (1964); Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959).

179. OPS. MICH. ATT'Y GEN. NO. 4211 (Nov. 18, 1963).

180. OPS. MICH. ATT'Y GEN. NO. 4161, at 6 (July 22, 1963).

181. *Id.* at 6-8.

182. 334 U.S. 1 (1948) (enforcement by a state court of a restrictive covenant prohibiting sale of land to Negroes is "state action" within the purview of the fourteenth amendment).

183. OPS. MICH. ATT'Y GEN. NO. 4161, at 9 (July 22, 1963).

184. *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875): "The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the [due process clause] . . . add anything to the rights which one citizen has under the Constitution against another"; *Civil Rights Cases*, 109 U.S. 3, 17 (1883): "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . ."; *Peterson v. Greenville*, 373 U.S. 244, 247 (1963): "It cannot be disputed that under our decisions 'private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.'"

right terms in *Shelley v. Kraemer*,¹⁸⁵ the very case from which the Attorney General was quoting. The Federal Civil Rights Act of 1866, despite the seeming breadth of the language it contains, protects Negroes only from *state-enforced* discrimination in housing. In the absence of a drastic rewriting of precedents by the Supreme Court or explicit congressional action, federal law cannot be viewed as giving rise to enforceable guarantees against racial discrimination in the private housing market.

Perhaps the Attorney General's reference to federal law was meant to suggest the more subtle argument that the words "civil rights" in article V, section 29 include all legally protected interests or at least all such interests dealt with in such civil rights statutes as the Federal Civil Rights Act of 1866. The argument, in brief, is that the Michigan constitution employs the term "civil rights," not in the specific sense of enforceable guarantees that protect persons against discriminatory treatment by reason of race, color, or previous condition of servitude, but in the generalized sense which includes all legally protected interests of individual citizens. Under this view, article V, section 29 would empower the Civil Rights Commission "to secure the equal protection of [all interests of personality] guaranteed by law and by this constitution without discrimination against any person because of religion, race, color or national origin." Since purchase and ownership of property is a legally protected interest under Michigan common law—and is also guaranteed against state-enforced denial on racial grounds by the Federal Civil Rights Act of 1866—it can be argued that any racial discrimination affecting purchase or ownership of property is within the jurisdiction of the Civil Rights Commission.

In my judgment, it does not make sense to interpret the term "civil rights" as including all legally protected interests. A more natural reading would confine the term to the narrower category of "rights" that carry specific remedies and impose correlative duties on other private persons. The only plausibility to the broader interpretation derives from the fact that article V, section 29 qualifies the "civil rights" to be protected by the Commission by referring to "discrimination . . . because of religion, race, color or national origin"; it is therefore possible to argue that "civil rights" is not used in the narrow sense of enforceable rights of nondiscrimination, since

185. 334 U.S. 1, 13 (1948): "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

the reference to discrimination would then be redundant. But this can also be attributed to an excess of caution—a disinclination to leave open the possibility that the bare phrase “civil rights” would be viewed in the broader sense of enforceable personal rights, a reading that would allow the Commission to exercise a jurisdiction analogous to that of common-law courts.¹⁸⁶ And, at most, it argues that “civil rights” should be read in the central sense of enforceable personal rights,¹⁸⁷ rather than in a loose sense which includes all legally protected interests.

Legally protected interests, of course, assume an almost infinite variety of forms and receive varying degrees of protection. Multiple remedies may be provided for the invasion of some interests, while others are accompanied by little or no remedial machinery. The scope of a right determines the degree of protection that is afforded: Who possesses the right? Is it enforceable only against state officials? Is it enforceable against private persons? These characteristics are part of the “right” itself.

An illustration may clarify the distinction between “rights” and “legally protected interests.” Suppose, for example, that *A* desires to sell his private home. In selecting a purchaser, he discriminates against *B*, a Negro. Does *A*’s conduct violate *B*’s “civil rights?” A lawyer, whatever his views concerning the morality of *A*’s behavior, must give a negative answer. Apart from any rights created by the new Michigan constitution, *B* does not have a legally enforceable right to purchase *A*’s house. *A*, on the other hand, is not under any duty to sell to *B*; nor is he under any obligation not to discriminate on account of race in the selection of a purchaser.¹⁸⁸ However, both *A* and *B* have legally protected interests in the purchase and sale of property: each possesses the power or capacity, in conjunction with one another, to create property interests that will be recognized and enforced by the courts. Thus, if *A* of his own volition decides to sell to *B* and the two enter into a valid contract, legal interests are

186. If the Commission’s jurisdiction extended to the denial of all enforceable personal rights, ordinary tort and contract litigation would be within its competence. Moreover, individual rights, for example the right to vote, may be denied on nonracial grounds, such as the loss of civil rights by convicts and felons. By limiting the authority of the Civil Rights Commission to denial of civil rights based on racial, religious, and ethnic considerations, denials of other enforceable personal rights were placed beyond its jurisdiction.

187. *Cf.* 10 AM. JUR. *Civil Rights* § 894 (1937), which defines “civil rights” as follows: “Civil rights in their full sense cover a wide field of ordinary individual rights assured to every member of a well-regulated community. The term embraces the rights due from one citizen to another, deprivation of which is a civil injury for which redress may be sought in a civil action.”

188. *McKibbin v. Corporation & Sec. Comm’n*, 369 Mich. 69, 119 N.W.2d 557 (1963) (by implication).

created that Michigan must respect and enforce. Federal law—the Civil Rights Act of 1866—forbids Michigan from denying *B*, because of his race, the power to create and enjoy enforceable property interests, whenever other individuals are willing to deal with him or to grant or devise property to him.¹⁸⁹

The capacity to create certain enforceable legal relations by one's voluntary act (often only with the conjunction of another person), such as contract rights, property rights, the marriage relation, and so on, is an essential ingredient of citizenship. Federal constitutional guarantees, implemented by Congress, prevent any *state* from denying these "rights" on racial grounds; but these rights are enforceable only against state officers and not against private persons.

The Michigan constitution is a *legal* document. When it speaks of "civil rights" it refers to legal rights and not to the looser conception of "rights" that has nothing to do with law or with courts but is part of the common language. When a man asks his neighbor, "Now don't you think I am within my rights?," he is referring to aspects of action or relation that are desirable and are socially approved. In this sense, a person's "rights" are what people think he ought to have; they have little to do with the behavior of courts in response to *legal* claims of right. In legal usage, a right involves a legal relation between people. If *A* has a right that *B* shall do something, *A* can invoke the aid of a court if *B* fails to perform his *duty*. Hohfeld reminds us to look for a *duty* before we talk of a *right*. If no one has been required to behave in the manner that corresponds with the claimed right, if no remedial machinery is available for its vindication, then we are talking about privileges or powers or moral commands—but not about legal *right*.¹⁹⁰

These arguments based on ordinary usage are bolstered by the tenor of the discussion in the convention. The term "civil rights," both in connection with the anti-discrimination declaration of article I and the civil rights commission provision of article V, was used by the delegates in the sense of legally enforceable guarantees against

189. See *Buchanan v. Warley*, 245 U.S. 60 (1917) (right to acquire, enjoy, and use property guaranteed by fourteenth amendment violated by city ordinance forbidding Negroes to occupy houses in blocks where majority of houses are occupied by white persons).

190. Mr. Justice Holmes made the point long ago: "[F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who are said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it." HOLMES, *COLLECTED LEGAL PAPERS* 313 (1920). The pioneer analysis is that of Wesley N. Hohfeld. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

discriminatory treatment.¹⁹¹ This usage is found in the majority report supporting the proposal that became the anti-discrimination declaration: "As Mr. Hannah stated in his paper to the committee, 'Civil rights as used herein means guarantees to protect against discrimination and segregation because of race, color, religion, ancestry or national origin. . . .'"¹⁹²

A final argument against interpreting "civil rights" as including every legally protected interest parallels a point discussed earlier.¹⁹³ If the Civil Rights Commission has been given plenary and exclusive authority to protect every person against "discrimination . . . because of religion, race, color or national origin in the enjoyment of [legally protected interests]," the fabric of legal relations in the community has been fundamentally reshaped and traditional agencies of government have been shouldered aside by a brash newcomer, the Civil Rights Commission. Neither the text, nor the journal of the convention, nor the materials submitted to the electorate provide any support for such an abrupt innovation.

Indeed, the implications of the Attorney General's position are staggering. Private organizations that restrict their membership on racial, religious, or ethnic grounds would violate the constitutional command when they refuse to admit an applicant not possessing the required characteristics; they would be interfering with the applicant's enjoyment of his legal interest in private association. A Lutheran church that limited eligibility to its vacant pastorate to Lutherans would be interfering on religious grounds with the employment interests of Congregationalists, Presbyterians, and others. A family that limited the availability of live-in facilities to a college student of similar race, religion or national origin would be interfering with the housing interests of other students. Perhaps even a testator's bequest establishing a trust fund to provide scholarships for needy Negro students would be invalidated. The very breadth of the implications of the Attorney General's position casts doubt upon its validity.

And what are the remedial incidents of the constitutional protections that would thus be placed beyond legislative adaptation? Suppose, for example, that *A* has discriminated against *B*, a Negro, in selecting a boarder to live in his home. In the absence of legislative creation of rights and remedies relating to racial discrimination in private housing, may the Civil Rights Commission order *A*

191. See, e.g., 1 RECORD 740; 2 *id.* 1934, 1982-83.

192. 1 *id.* at 740.

193. See text at note 130 *supra*.

to rent his room to *B*? If the room has already been rented to *C*, may the Commission require *A* to pay compensatory damages to *B*? May it invalidate the lease between *A* and *C*? May it require *A* to pay punitive damages to *B* or to pay a civil fine to the Commission? If *A* has been assisted in his discriminatory behavior by *D*, a real estate broker, may the Commission revoke *D*'s broker's license? (No one, I trust, would argue that the Commission—even with legislative authorization—could entertain a criminal proceeding against either *A* or *D*, charging them with illegal discriminatory behavior.) These are questions one would expect a legislature to deal with when enacting legislation involving discrimination in private housing. Although courts and administrative agencies participate in the definition of legal interests and the fashioning of remedies, legislative bodies play the primary role in adjusting legal protections to meet society's changing needs. The explicit reference in article I, section 2 to legislative implementation and the repeated references to legislative prerogatives in article V, section 29 indicate that no departure from this traditional approach was intended in the revised constitution. Article V, section 29 does not give the Civil Rights Commission virtually unlimited authority to establish standards governing private conduct and to formulate the remedial aspects of any violation of these standards.

2. *The argument based on the sequence of events in the convention.* The Attorney General's conclusion that the Civil Rights Commission has plenary authority "to protect and secure the equal opportunity in employment, education, housing and public accommodations" does not rest solely or even primarily on a broad reading of the term "civil rights." Principal reliance is placed on the sequence of events in the evolution of the civil rights commission proposal—the temporary acceptance by the convention of the Austin proposal, which contained specific reference to "the civil right to employment, education, housing, [and] public accommodations,"¹⁹⁴ and several statements by Mr. Van Dusen to the effect that his substitute proposal, which the convention adopted, did not make any substantive changes in the powers of the Commission.¹⁹⁵

The three or four passages relied upon by the Attorney General must be read in the context of the convention's entire consideration of the civil rights issue. When this is done, it is apparent that the excerpts relied upon by the Attorney General do not support the construction he gives them.

194. For the full text of the Austin proposal, see 2 RECORD 1982.

195. *Id.* at 2182, 2186.

First, the remarks of Messrs. Van Dusen and Pollock in explaining the substitute proposal that had been worked out in the Republican caucus *were* literally correct. Mr. Van Dusen said only that civil rights in employment, education, housing, and public accommodations would be "within the purview of the civil rights guaranteed by law in this constitution."¹⁹⁶ Civil rights in the four areas mentioned had been repeatedly referred to by the delegates. They were existing rights under present statutes and constitutional provisions. Since they were "civil rights guaranteed by [existing] law," it was apparent that they were within the "area of concern"¹⁹⁷ of the Commission. If it could not act upon them, it could not act upon anything.

The exchange between Mr. Binkowski and Mr. Van Dusen, which was relied upon by the Attorney General, is along the same lines:

"MR. BINKOWSKI: Mr. President, ladies and gentlemen, for the record I would like to defer to Mr. Van Dusen because I think that this point should be clarified, in case we have a judicial review of this section so that it is clear that if this convention does not go on record as adopting the Austin and Elliott amendment, *certainly it is not to be construed that we do not want a civil rights commission operating in those enumerated areas.*

"MR. VAN DUSEN: Mr. President, I would answer Mr. Binkowski's question very clearly: I don't think that the substitute amendment intends any substantive difference in this area. I thought I made that reasonably clear in my opening remarks. The only reason for not omitting the 4 enumerated areas of discrimination was that in view of the report of the committee on declaration of rights, suffrage and elections in connection with [the anti-discrimination declaration of article I], that committee made it very clear that *among the civil rights, therefore, to be within the area of concern of this commission, are the matters of equal opportunity in employment, education, housing and public accommodations.* [Mr. Van Dusen then read a passage from the report of the Committee on Rights, Suffrage, and Elections.]

"The only reason for the omission of these specific areas of discrimination from the substitute amendment now under consideration was that *it would be redundant to mention them in the light of the action already taken with respect to [the anti-discrimination declaration]*, and further, that it would be construed perhaps as a limitation upon the powers of the commission, which was not intended by the sponsors of the Austin

196. *Id.* at 2182. Statutory rights in the housing field extended, of course, only to public housing.

197. *Id.* at 2186.

amendment or by the sponsors of the substitute now before the convention."¹⁹⁸

In short, it was no one's intention to deprive the Civil Rights Commission of authority to enforce civil rights in *any* area in which rights protecting against discrimination had been created by statute or by constitution.

Second, reference to the earlier consideration of the anti-discrimination declaration and to the report of the committee that sponsored it do not reveal an intent to create new civil rights. It was a way of saying that "we have been through this once before; the majority is willing to make a general declaration and to create a Commission that will operate upon rights created elsewhere; the minority wants to include much broader language; we refused to do so then, and we refuse to do so now." This is implicit in Mrs. Hatcher's remarks. She spoke immediately after Mr. Van Dusen had finished his reply to Mr. Binkowski, *supra*, and she reminded the delegates that the language Mr. Van Dusen had quoted¹⁹⁹ ("The principal, but not exclusive, areas of concern are equal opportunities in employment, education, housing, and public accommodations.") was from the committee report and had not been included in the constitution: "... [W]e mentioned civil rights [in the constitution], but we did not spell out the meaning of civil rights. I believe in our committee meeting we accepted the language to be inserted in the comments that the areas of civil rights would mean housing, education, public accommodations and the like. . . ." ²⁰⁰ In short, these are the areas in which rights existed or in which there was hope that the legislature would create rights.

Third, the Attorney General assumes the convention understood that the Austin proposal, which was temporarily adopted, would create broad new civil rights, including freedom from discrimination in all private housing. This was not the case. The language of the Austin amendment—"the civil right to employment, education, housing, public accommodations, and to such other civil rights as provided by law and the constitution"—does not require this con-

198. *Ibid.* (Emphasis added.)

199. Mr. Van Dusen read from the report presenting the anti-discrimination declaration: "Delegate John Hannah . . . gave impressive and moving testimony before the committee (on Rights, Suffrage and Elections) upon the wisdom and necessity of such a clause to protect negroes and other minorities against discrimination in housing, employment, education, and the like.

"Later on in the same report they state that 'The principal, but not exclusive, areas of concern are equal opportunities in employment, education, housing, and public accommodations.'" *Ibid.*

200. *Id.* at 2186-87.

struction. Perhaps a more plausible reading is that "the civil right" in the four enumerated areas is that already "provided by law." It is noteworthy that civil rights had been created in all four areas;²⁰¹ in the housing field the rights extended, of course, only to public housing.

Nor did proponents or opponents of the broader Austin language clarify its meaning, either in the late hours of March 29 when the question was first discussed or a week later when the group led by Mr. Austin attempted to reinsert similar language in the Van Dusen proposal. On the earlier date, five Democratic delegates spoke in favor of the Austin proposal, but each of them was vague and indefinite concerning its precise substantive import. Mr. Austin said that his provision would "put the teeth in this commission that it needs if it is going to do an effective job . . .,"²⁰² but this remark may have referred to the procedural powers, which were spelled out for the first time in his proposal. Mr. Binkowski talked about equal opportunity in lofty terms,²⁰³ and Mr. Nord was equally ambiguous concerning the effect of enumerating the four areas.²⁰⁴ Mr. Norris was hardly more definite, commenting that the Austin proposal "does carry forward the idea of giving specific form to the rights which we seek to protect as the indispensable minimums to full equality and full humanity for all of our citizens. . . ."²⁰⁵ There is in these comments, of course, an aura of "this language accomplishes more." It was sufficient to arouse fears in some delegates that existing rights of private association would be threatened.²⁰⁶ But the discussion immediately turned to other matters—the composition of the Commission and the list of powers in the second paragraph. The question of its meaning was not clarified before the evening session on March 29 adjourned.

Moreover, Mr. Austin, the principal proponent of the broader language, repeatedly declared that his language would not create any new civil rights.²⁰⁷ The delegates were entitled to take him at

201. See statutes cited notes 145-47 *supra*.

202. 2 RECORD 1982.

203. *Id.* at 1983.

204. *Id.* at 1984-85.

205. *Id.* at 1984.

206. See, e.g., the fears of Mr. Hatch: "I don't know what the civil right to employment is. Nowhere in the constitution have we defined a civil right of employment. As Mr. Everett pointed out earlier, does this include the right to work? Just what does it include? I don't know. The civil right to education. What does this mean? Does it mean that everyone has a right to education, K through 12, through college? Just what does it mean? The civil right to housing. Does this conceivably mean that if I desire to sell my home only to persons of Dutch descent, I would then be in violation of this civil right to housing? And, if so, what can this commission do to me?" *Id.* at 2002.

207. Mr. Austin stated that inclusion of words referring to four specific areas of

his word. When Mr. Van Dusen stated that "I have discussed this sentence with the proponents of the original Austin amendment and I think it is reasonably clear that there is no substantive change here,"²⁰⁸ it is reasonable to assume that Mr. Austin had told Van Dusen what Austin stated on the floor of the convention—that his language would not create new rights. Other delegates appear not to have shared Mr. Van Dusen's conviction that omission of the Austin language made no difference; indeed, the efforts of the Democratic minority to reinsert it after it had been omitted argue that it was thought to be significant. But actions speak louder than words. The convention, in rejecting the Austin language, did not, as the Attorney General argues, adopt it by implication.

Finally, the manner in which the civil rights commission provision evolved argues against giving significance to the temporary adoption of the Austin language on March 29. The major step taken on that date was the decision to have a self-executing Commission with certain minimum procedural powers. The Austin proposal, submitted as an amendment to an amendment,²⁰⁹ was the first proposal to combine these two self-executing features. Most of the discussion of the Austin proposal was concerned with the language that dealt with the establishment, composition, and powers of the Commission;²¹⁰ definition of the "civil rights" to be protected was discussed only briefly.

Moreover, the parliamentary situation was confused and the hour was late. No one had seen the various proposals in advance, a problem that caused some complaint,²¹¹ and repeated references were made to the lateness of the hour and the fatigue of the delegates.²¹² The importance of the Austin proposal was thought to be its self-

discrimination "is a must. They do not create any rights." *Id.* at 2186. Later, in response to Mr. Higgs' specific question, he stated: "it is not our intention to create any new rights, only to focus attention on the fields in which we have discrimination." *Id.* at 2188.

208. *Id.* at 2182.

209. Mr. Boothby had offered a substitute to the committee amendment. *Id.* at 1976. The Boothby amendment was adopted, 118 to nine. *Id.* at 1979. Mr. Bentley then offered an amendment in the nature of a substitute for the Boothby amendment. *Id.* at 1982. When it became clear that amendments to the Austin proposal could not be considered unless the Bentley amendment was withdrawn, Mr. Bentley withdrew his amendment, thus making it possible for the committee of the whole to consider amendments to the pending Austin proposal. *Id.* at 1989.

210. See *id.* at 1982-87, 1988-2006.

211. See, e.g., *id.* at 2003, where Mr. Leppien observed, "I hope that this convention never again asks the delegates to be in a convention session of this kind and not have before us the necessary copies of amendments as long as the Austin or other amendments that have been before us this night."

212. *Id.* at 2002 (Mr. Higgs); *id.* at 2001 (Mr. Lawrence); *id.* at 2005 (Mr. Wanger).

executing features in terms of the establishment of the Commission and its minimum powers. After the session of March 29, further consideration of the civil rights commission provision was postponed so that the Republican caucus could give it more careful consideration.²¹³ It is only fair to assume that the changes that were made, and that were then adopted by the convention, were made deliberately and for a purpose.

3. *The argument based on the convention's rejection of other constitutional provisions.* The Attorney General's opinion also relies upon the fact that the convention, after adopting the civil rights commission provision, twice rejected a proposal to include in the declaration of rights a section forbidding the legislature, other than by general law, to limit the right of an owner of real property "to convey, grant, or devise said property."²¹⁴ In fact, the initial "property owner's proposal" came before the committee of the whole two weeks before the final adoption of the civil rights commission provision, and, after full discussion, it was rejected by the convention.²¹⁵ Later attempts to include this provision in the declaration of rights failed for the same or similar reasons and had little or nothing to do with the civil rights commission proposal.

The "property owner's proposal" was intended to be largely declaratory of the common law. It would not have impaired the legislature's power to restrict private discrimination in the housing market; it merely required that any such restriction be done by the legislature and by general law. Many delegates thought the major purpose was to prevent an administrative agency from promulgating rules that would limit the existing right of a property owner to sell or devise his property as he desired.²¹⁶ The validity of Rule 9 of the Corporation and Securities Commission, prohibiting real estate

213. Mr. Van Dusen, in introducing the substitute proposal which was ultimately adopted, reminded the delegates of the prior consideration of the Austin proposal: "I think all of the delegates will recall that the section which we are now considering was adopted in the closing hours of a long day's session which ran on well into the evening. Many amendments were made to it rather hastily and without the opportunity for detailed consideration. One of the reasons for the delay of the consideration of Committee Proposal 71 from last Friday until today was to give some opportunity for some careful consideration of this section, with the opportunity and hope of making clarifying amendments which would improve it, which would make clear its intentions." *Id.* at 2182.

214. OPS. MICH. ATT'Y GEN. No. 4161, at 14-15 (July 22, 1963).

215. The text of the proposal is reproduced in 2 RECORD 2272. The discussion appears in *id.* at 2272-87. The proposal was rejected on April 10, 1962, by a sixty-three to fifty-nine vote. Two later attempts to revive the proposal, on April 26 and May 7, were likewise rejected. *Id.* at 2866-69, 3093.

216. *Id.* at 2274 (exchanges between Messrs. Binkowski and Stevens); *id.* at 2867 (exchanges between Messrs. Binkowski and Stevens).

brokers licensed by the Commission from engaging in discriminatory practices, was then before the courts.²¹⁷

The reasons why the "property owner's proposal" was repeatedly rejected by the convention, both before and after the approval of the civil rights commission provision, had nothing to do with the question of whether the convention intended to create novel rights protecting individuals from racial, religious, or ethnic discrimination in the private housing field. Some delegates thought the declaration was unnecessary, being merely declaratory of existing law.²¹⁸ Others thought it unwise to forbid the legislature to delegate the power to limit rights of property owners. Still others questioned the proposal on technical or drafting grounds: Would it affect the power of the courts to determine property rights?²¹⁹ Would it limit rather than expand the rights of property owners?²²⁰ What was a general law?²²¹ Rejection of the proposal signifies only that the convention was content to leave the issue where it then was—in the hands of the legislature.²²²

Indeed, the history of the "property owner's proposal" provides further evidence that the convention did not intend to create new rights of nondiscrimination in private housing. The report accompanying the "property owner's proposal," which had been prepared by the Committee on Rights, Suffrage and Elections, supported the proposal on the following grounds:

"This proposed new section in the declaration of rights is essentially declaratory in character. It creates a specific constitutional guarantee of the long established principle of the common law whereby the individual, subject to the police power of the state, possesses a right to control the disposition of

217. Repeated references were made to the effect of the property-owner's proposal on Rule 9. For the subsequent invalidation of Rule 9, see *McKibbin v. Corporation & Sec. Comm'n*, 369 Mich. 69, 119 N.W.2d 557 (1963).

218. See, e.g., 2 RECORD 2282: "[I]f it is only declaratory of the common law, then why do we need it?"

219. See Mr. Mahinske's comments and questions. *Id.* at 2275-76.

220. See, e.g., *id.* at 2277 (Mr. Nord); *id.* at 2868 (Mr. A. G. Elliott: "The reason that I intend to vote against the amendments is that I'm afraid this limits the rights of the property owners in a way that we don't want. . . .").

221. *E.g.*, *id.* at 2277.

222. As Mrs. Hatcher stated, in explaining why she opposed any provision in the constitution dealing with racial discrimination in private housing: "The reason that I did not submit an amendment with reference to open occupancy and the freedom of the purchase of property by any citizen is because I feel that it is completely legislative and it's a matter that the legislature should deal with. So for those reasons and many more that I do not care to state at this time, I seriously oppose the [property-owner's proposal]" *Id.* at 2868. It is noteworthy that Mrs. Hatcher, one of the group which had supported the Austin proposal, believed—after the adoption by the convention of the Civil Rights Commission provision—that racial discrimination in the private housing market had been left to the legislature.

his real property. *The committee points out further that the provision is not at odds with the proposed civil rights section already reported to the floor. That section would require statutory enactment to authorize any infringement upon the right of conveyance in pursuance of civil rights guarantees and the present proposed section simply confirms that requirement in specific terms for real property. The prohibition upon legislative delegation of the power to control or limit conveyance means that an administrative decree to that end, otherwise unauthorized by statute, would be in violation of the constitution.*"²²³

V. CONCLUSION

The Michigan Civil Rights Commission is an important, powerful agency that has substantial tasks to perform. But it does not possess plenary and exclusive power to formulate and implement social policy on all matters relating to race relations. The intent of the constitution-makers in this regard was an important but limited one: to establish a constitutional agency—self-executing in the sense that its existence and minimum powers were not dependent upon legislative action—which would assist in the enforcement of civil rights elsewhere created. Neither the framers nor the ratifiers evinced a purpose to effect a fundamental alteration in the legal order by creating enforceable rights and duties in the areas of private discriminatory conduct. The constitutional language, viewed in the light of its history, does not permit such an interpretation. Although language is a slippery tool, there are limits to manipulation by interpretation; Humpty Dumpty was wrong when he said, "When I use a word . . . it means just what I choose it to mean, neither more nor less."

The Civil Rights Commission possesses authority to implement such civil rights as are specifically mentioned in the constitution, established by federal law, or specified and defined by state statute. The Commission does not have an unlimited power—free from democratic control through elected representatives of the people—to create private rights and duties and to fashion remedial machinery. Indeed, the Commission possesses no substantive law-making power other than that incidental to the exercise of its judicial powers in the decision of individual cases; and even this power is subject to extensive judicial review. The legislature retains its traditional role as the major source of rights and duties which govern the relationships of private citizens. The courts must continue to define existing rights by the traditional process of interpretation, as con-

223. *Id.* at 2272. (Emphasis added.)

stitutional and statutory provisions come before them in contested cases. Nor does the constitution express an intent to bar other agencies of government—executive officers, local governments, etc.—from acting to preserve existing or new civil rights of nondiscrimination.

The long struggle for racial equality will not be served by acceptance of the position that the Civil Rights Commission has a monopoly of governmental power. The task is far too immense to be left to a single agency of government. The cooperation of all agencies of government—the legislature, the executive branch, the courts, and the local authorities—will be required to provide equal opportunity for all citizens. Under any view, there are serious limitations on the Commission's powers to act. The Commission will always be dependent upon the legislature for financial support and additional powers. There is no assurance that the high quality of the present commissioners will be maintained and that the Commission will not come under the control of interested groups or of those who would use it for narrow political ends. Finally, the Commission's efforts may prove ineffective if its views on basic policy issues are too far in advance of public opinion or legislative sentiment. In a democracy the basic obligations of a private individual should be hammered out by the representatives of the people, not delivered from Olympus.

The welfare of the state and the nation is deeply involved in the task of providing genuine equality of opportunity for all citizens. There is a grave danger that this grand objective may be impaired by exclusive reliance on a single administrative agency. The purported powers of the Civil Rights Commission provide excuses for legislative and local inaction in the civil rights field and may frustrate the efforts of the protest movement. It is to be hoped that a prompt and authoritative judicial resolution of the issues discussed in this article will end this period of paralysis.